

Supreme Court, U. S.
FILED

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MICHAEL ROBAK, JR., CLERK

APPENDIX

In The
Supreme Court of the United States

October Term, 1975

—o—
No. 74-1263
—o—

LOU V. BREWER, Warden of the Iowa State
Penitentiary at Fort Madison, Iowa,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a
ANTHONY ERTHEL WILLIAMS,
Respondent.

—o—
**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 5, 1975

CERTIORARI GRANTED DECEMBER 15, 1975

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RELEVANT DOCKET ENTRIES
POLK COUNTY DISTRICT COURT,
STATE OF IOWA:

Date
1969

May 6 Ruling [Motion to Suppress Evidence]

SUPREME COURT,
STATE OF IOWA:

1970

December 15 Opinion

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF IOWA:

1972

October 16 Petition for Writ of Habeas Corpus

1974

March 28 Memorandum and Order

April 11 Respondent's Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT:

1974

December 31 Opinion

December 31 Judgment

1975

January 14 Petition for Rehearing and Suggestion for Re-
hearing En Banc

January 30 Order [Denying Petition for Rehearing En Banc
and for Rehearing]

January 30 Application for Stay of Mandate

February 6 Order [Staying Mandate]

On the 6th day of May, 1969, the Polk County District Court entered the following ruling on the Respondent's Motion to Suppress Evidence:

CRIMINAL NO. 55805

STATE OF IOWA,

Plaintiff,

vs.

ANTHONY ERTHELL WILLIAMS,

Defendant.

RULING

* * *

Defendant's motion to suppress evidence, filed March 25, 1969, went to hearing on April 2, evidence being offered by both parties. The Court finds as a fact that the return trip from Davenport to Des Moines, the subject of the evidence, and the source of the information from the Defendant sought to be suppressed, was a critical stage in the proceedings requiring the presence of counsel on his request. The Court further finds that an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines; rather, that he would talk to police officials, with his attorney, on arrival in Des Moines. Even if such agreement were violated, it could not be the foundation for suppression, but it does serve the purpose of helping to establish the Defendant's state of mind as to whether he would or would not give information before seeing his attorney in person.

However, based on the evidence at the hearing, the Court finds as a fact that the Defendant did voluntarily give information to the officers and thus waived his right to have an attorney present during the giving of such information. It is clear from his testimony and the other testimony that he was well aware of his rights and understood them well. The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right. There is no question but that he could change his mind from what it was at the Davenport Police Station and thereafter intelligently and informedly waive his right to the presence of his counsel. This finding of fact is made by the Court

even though the Court is not entirely convinced that Chief of Detectives Leaming testified with complete candor at this hearing, regarding the "agreement" with Defendant's attorney.

These findings are made beyond a reasonable doubt.

/s/ J. P. Denato
Judge

On December 15, 1970, the following opinion was issued by the Supreme Court of Iowa:

STATE of Iowa, Appellee,

v.

Robert Anthony WILLIAMS, a/k/a Anthony
Erthel Williams, Appellant.

No. 53743

LARSON, Justice.

Pursuant to indictment charging defendant with the crime of murder, in violation of sections 690.1 and 690.2 of the 1966 Code, filed in Polk County District Court on February 6, 1969, a plea of not guilty was entered and trial by jury began on April 30, 1969. A verdict of guilty was returned on May 6, and on May 14 defendant was sentenced to imprisonment for life as provided by section 690.2 of the Code. He appeals. We affirm.

As grounds for reversal appellant contends (1) that the trial court erred in overruling his motion to suppress the State's evidence offered by all witnesses as to admissions against interest, statements, demonstrations and confessions made by him while in police custody on an automobile trip from Davenport to Des Moines, Iowa, on December 26, 1968; (2) that evidence of admissions against interests, statements and confessions made by defendant should not have been admitted in evidence at the trial because it was violative of the Fifth and Sixth Amendments to the Constitution of the United States and under the Constitution of the State of Iowa, and the waiver of those rights had not been demonstrated. In short, it is appellant's contention that under

these constitutions and the decisions of the courts since the Escobedo and Miranda cases the State failed to sustain its burden to show the defendant voluntarily gave the officers with whom he was riding information, some of which led to the discovery of the body of the murdered child, and that he knowingly and intelligently waived his right to remain silent and to have the assistance of counsel at the time of giving that information.

We shall presently discuss the propositions advanced by appellant to sustain his contentions, but first we set out a short statement of the circumstances surrounding the crime and the apprehension, custodial treatment, and transportation of defendant to Des Moines on December 26, 1968.

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, age 10, failed to return from a visit to the wash-room a search was started for her, but she could not be found in the building, and the police were called. About that time, or between 1 and 1:30 P.M., the defendant Williams, who had a room on the seventh floor of the building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket similar to those provided in the YMCA rooms. He spoke to several persons on the way out, explaining to one party that he was carrying a mannequin. He requested the aid of a 14-year-old boy to open first the Locust Street door and then the door to his Buick automobile parked on the south side of the street facing east. This boy testified that when the defendant Williams placed the bundle in the passenger seat he "saw two legs in it and they were skinny and white." Efforts by YMCA personnel to view the object were thwarted by defendant as he closed and locked his car doors and drove away. They also called for the police.

Pursuant to an A.P.B. put out by the Des Moines police department defendant's Buick car was found in Davenport, Iowa, on December 25, 1968, and a search for him in that area was made by Davenport, Des Moines, and State Bureau of Criminal Investigation officers.

On the morning of December 26 at about 8:45 A.M. Mr. McKnight, a well-known Des Moines attorney, came to Detective Leaming's office at the Des Moines police station and informed the officers present that Williams was going to surrender and there would be a telephone conversation with him at Davenport around 9 A.M. A call was received about that time from the Davenport

police advising that Williams had turned himself in and, at Williams' request, he was permitted to talk to Mr. McKnight, who allegedly then told Williams not to talk until he arrived back in Des Moines and saw McKnight. Contending the officers heard that admonishment and agreed not to interrogate Williams before they arrived back in Des Moines, McKnight assured Williams he would be in the custody of good officers and would be safe. Captain Leaming and Detective Nelson were then dispatched to Davenport to bring Williams to Des Moines. On the return trip Williams made statements and revelations which became the subject of defendant's motion to suppress and the waiver issues involved herein.

[1, 2] I. The concept of waiver of one's constitutional rights during the various stages of the criminal process, it is said, has long been recognized by the courts. 21 Am. Jur. 2d, §§ 219, 316, 317. Also see *State v. McClelland*, Iowa, 164 N.W. 2d 189, 195; *Mullaney v. State*, 5 Md. App. 248, 246 A. 2d 291, 301; *State v. McPherson*, Iowa, 171 N. W. 2d 870, 873; *Land v. Commonwealth*, 1970, Virginia Supreme Court of Appeals, 176 S.E. 2d 586. Almost all of the protections which the federal and state constitutions provide for the citizen, such as the Sixth Amendment's right to counsel and the Fifth Amendment's privilege against self-incrimination, may be relinquished by him. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Vol. 19, Am. Jur. Proof of Facts, Annotated, Waiver of Rights under Miranda, contains an excellent review of the entire subject, § 1, p. 3 to § 50, p. 85, inclusive. Waiver has often been defined in this regard as "an intentional relinquishment of or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357; *State v. Kartson*, 247 Iowa 32, 72 N.W. 2d 463; *People v. Marsh*, 14 Mich. App. 518, 165 N.W. 2d 853 (1968); *Babbs, Inc. v. Babb*, Iowa, 169 N.W. 2d 211 (1969); *Broadbent v. Hegge*, 44 Wis. 2d 719, 172 N.W. 2d 34 (1969). Miranda is not unique in its affirmation of the traditional concept of the ability and right of an accused to waive his fundamental constitutional rights with or without his counsel's consent or presence during the pretrial stages of the criminal process. See *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. Nor is it especially distinctive in its specific holding that the right to counsel and the privilege against self-incrimination may be waived by an accused during the period of custodial interrogation. *State v. Clough*, 259 Iowa 1351, 147 N.W. 2d 847; *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970). The Miranda decision is significant because of its acquiescence with the Escobedo rule that coun-

sel is essential during the in-custody interrogation if he is to be of meaningful assistance to his client, because of its skeptical attitude toward what precisely is a waiver "knowingly and intelligently" made, and because of its uncompromising delineation of the evidentiary requirements which must be met by the prosecution to "demonstrate" a valid waiver.

[3, 4] Thus, the rule we draw from Miranda and subsequent high court decisions is that whenever a person is taken into custody or his freedom of action is restrained by law enforcement officers "in any significant way" and after he has been given the required warnings, several choices or alternatives of action are open to him. (1) He may decide to waive the right to consult with and have counsel present with him during the interrogation, relinquish his privilege against self-incrimination, and respond to the questions or suggestions of the officers. Clearly, such a waiver may be made after the accused has discussed the matter with an attorney who has explained the potential ramifications of his decision. Miranda, however, does not require the accused to consult with an attorney before he makes the waiver decision. He may do so right after receiving the warnings or later and in the total absence of advice from counsel. See *Miranda v. Arizona*, supra, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, at page 723; Vol. 80, Harvard Law Review, p. 204. (2) The accused, after waiving his rights and responding to some questions and giving some information, may decide to cut off the questioning and exercise his privilege of silence and his right to immediate aid of counsel. Once he has manifested that intention, further interrogation must cease until his attorney is present.

[5] It also appears from Miranda that the accused may limit the scope and ambit of the interrogation and, when this limited waiver is enunciated, it must be respected, and of course if he is unsure of whether he should make a statement and requests the assistance of counsel, that request must be honored and further interrogation must cease until he has consulted with an attorney and thereafter consents to be questioned or voluntarily and willingly gives information. Furthermore, if he is indigent and requests counsel be appointed for him, this must be done and a reasonable opportunity afforded to confer with counsel.

[6] Waiver, of course, may not be presumed from a silent record, but neither is an oral or written expression required. A waiver may be found from an examination of all the attendant facts and circumstances. In *Johnson v. Zerbst*, supra, it is stated

that determination must depend on the facts and circumstances of each case. "Despite the fact that the testimony does not show an express waiver of appellant's right to remain silent and to counsel, we hold that the totality of the circumstances—the attendant facts of the case—are such as implicitly show that appellant voluntarily and intelligently relinquished these rights when he made his incriminating admissions." *Mullaney v. State*, supra, quoted with approval by us in *State v. McClelland*, supra at page 195 of 164 N.W. 2d.

[7, 8] In summary, *Miranda* devoted its principal attention to the issue of voluntariness in giving of waivers, and laid down certain requirements to guide and assist trial courts in resolving the question of voluntary waiver when it arises, either on a pretrial motion to suppress a defendant's statement or demonstration, or on a voir dire examination at trial. Although, in motions to suppress, questions involving the evaluation of credibility such as whether a certain statement was or was not made (the well-known swearing contest) the trial court must in the first instance pass judgment thereon, that determination is subject to our review. *State v. Leiss*, 258 Iowa 787, 791, 140 N.W. 2d 172, 175. Also see Vol. 19, Am. Jur. Proof of Facts, Waiver of Rights under *Miranda*, § 45 and citations. Thus, the appellate court has the duty to review rulings, in voir dire or in the trial proper, to see that the accepted statements are supported by other persuasive evidence and that none of the strict rules of proof set out in *Miranda* were violated by the trial court in passing on the admissibility of evidence produced on the issue as to whether the accused waived his right to remain silent and to have the present assistance of counsel. To that extent we review the facts. See *Greenwald v. Wisconsin*, 390 U. S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77, which required a review of the facts previously found sufficient to constitute a waiver.

[9] In any event, we give weight to the trial court's findings of fact, but are not bound by them (Rule 344(f)(1), R. C. P.), and note that the rules as announced in *Miranda* require generally that the State "demonstrate" to our satisfaction that defendant had been duly advised of his constitutional rights prior to the statements or information given, that he voluntarily, knowingly, and intelligently made the alleged statements after the warnings were given to him, and that they were not secured by force, threats or promises, or by artifice, deception, trickery or fraud. Failure to so demonstrate compliance with these requirements, of course, would call for a rejection of a claim of waiver by an appellate court.

[10] In passing on the adequacy of the State's showing in these regards, we have recognized the totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver. After a careful review of the circumstances shown herein, we must conclude as did the trial court that they were sufficient to admit into evidence before the jury the incriminating statements and the information obtained from Williams on his in-custody automobile trip from Davenport to Des Moines.

II. It appears from this record that defendant first filed a pretrial motion to suppress, alleging the information obtained from him by Captain Leaming was secured in such a way as to violate defendant's right under the Sixth Amendment to counsel or to counsel's present assistance, and to violate an alleged agreement between the officer and defendant's counsel that there would be no interrogation of defendant until their return from Davenport.

In his standing objections, timely made during trial and overruled by the court, defendant also maintained all information obtained by or through Leaming on his trip from Davenport in the Des Moines police car was secured in violation of the Fifth and Sixth Amendments to the federal constitution and of the due process clauses of the state and federal constitutions.

In the deferred ruling on defendant's motion to suppress, the trial court found (1) that the return trip from Davenport was a critical stage in the proceedings and the defendant could have had the assistance of counsel before making statements if he had made such a request, (2) that there was an agreement between defense counsel and police officials to the effect that defendant was not to be questioned on the trip to Des Moines, but that he would talk to police in the presence of his attorney when they arrived, (3) that even if that agreement were violated, it would not require suppression here, but did serve the purpose of establishing defendant's state of mind in deciding whether to give some information to the officers before they reached Des Moines, and (4) that under all the evidence produced at the hearing the court found as a fact that the defendant did freely and voluntarily give such information to the officers.

Under this record we are also satisfied that defendant was adequately advised of his rights and understood them well, that evidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed

desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged. It seems clear no statements or demonstrations which would connect defendant with this crime were made during the trip from Davenport to Grinnell, a distance of some 130 miles consuming two hours of time and that as they approached the Grinnell exit the defendant suddenly, spontaneously, voluntarily, and with no prompting, asked the officers if the child's shoes had been found, and then told where he put them when he stopped for gas on his way to Davenport. Even if defendant had chosen to remain silent at first, he was free to change his mind about talking to the officers and, as a matter of fact under the circumstances revealed, we think he did so as he approached Grinnell. We are satisfied that at this time he intelligently and informedly waived his right to the presence of his counsel, and we agree with the trial court that "These findings are made beyond a reasonable doubt."

In the trial proper, the defendant also made standing objections to all testimony of Captain Leaming related to his statements or actions on the return trip to Des Moines for the reason that defendant's statements were not voluntary and were made while he was in custody and when he was denied effective advice of counsel. They were generally overruled.

It seems abundantly clear that in overruling defendant's motion to suppress and in overruling his objections during trial to the evidence obtained by or through conversations between the defendant and the officer on the return trip to Des Moines, the trial court considered the totality of the circumstances as demonstrating beyond reasonable doubt defendant's voluntary and intelligent waiver of his right to remain silent and to have the assistance of counsel at that time. Thus, it appears the court followed the approved test for determining compliance with the Miranda mandates and committed no error in its rulings on admissibility.

III. A careful review of the record does not indicate there was any evidence compelling a conclusion as a matter of law that defendant's statements, revelations, or demonstrations were inadmissible at his trial.

It is undisputed that defendant was duly advised of his constitutional rights by the officers who had him in custody, i.e., Lieutenant Ackerman of the Davenport police department, Judge Metcalf, and Captain Leaming of the Des Moines police depart-

ment, the latter just before they started the trip to Des Moines about 2 P.M. on December 26, 1968. It is undisputed that defendant consulted his attorney McKnight by telephone before he turned himself in and later at the Davenport police station before returning to Des Moines, and twice with an Attorney Kelly during his brief stay in Davenport. No further counsel assistance was requested.

It is also undisputed that defendant made no statements or revelations to the officers prior to their approach to the Grinnell exit of the freeway about 130 miles from Davenport, and that shortly after leaving Davenport Captain Leaming told defendant Williams that he did not want him to answer but he wanted him to think when they were driving down the road. He asked Williams to observe the weather. It was then raining, sleeting and freezing, and visibility was very poor. He told Williams they were predicting snow that night and said, "I think that we're going to be going right past where the body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it." It also appears Williams had been told by his attorney something to the effect that he would have to tell the officers where the body was.

It is undisputed that no threats of any nature were made to Williams, that both counsel consulted by Williams prior to the trip told him not to talk until in McKnight's presence in Des Moines, and that there was no counsel available in the automobile on the return trip to Des Moines.

It is also undisputed that Williams was an escapee from a mental institute in Missouri, but his conduct and associations for several months had not indicated anything but normal behavior, and that the court ordered an examination at an Iowa Mental Health Institute, which did not find him incompetent or insane at this time.

The principal dispute is whether Officer Leaming attempted to interrogate Williams in the automobile during the trip to Des Moines. Williams said Leaming questioned him periodically concerning where the body was, not in rapid succession but every few miles. He recalled specifically a statement by Captain Leaming while they were drinking coffee at the Grinnell service station

that "You might as well tell us where the body is, we have an idea it's near Mitchellville, and when we get back to Des Moines, your attorney and you will accompany us back here and show us where the body is", a suggestion which conformed with the information already given him by his attorney. He also said Captain Leaming told him his attorney McKnight was ill with a heart ailment and it would be bad to make him go out at night to hunt for the body. On the other hand, Captain Leaming and Officer Nelson denied any interrogation of Williams and said the conversation, except for Leaming's first statement, did not relate to the crime charged but related to religion and what people thought of Williams in Des Moines. Captain Leaming further denied any promise to Williams or his attorneys that he would not attempt to question Williams on the trip or that he made any reference to McKnight's health at that time.

There is also a dispute as to whether this officer had an agreement with Attorney McKnight that there would be no interrogation of Williams until they arrived in Des Moines when all questions would be answered, and that they were to come straight back to Des Moines. Captain Leaming denied such an agreement, but there was testimony from other officers and the defendant which would support a finding that was counsel's understanding of the agreement.

On the other hand, Captain Leaming testified that as their automobile approached the Grinnell interchange Williams said to him, "Did you ever find her shoes?" and when Leaming said he didn't know but understood some things had been found at the rest area west of Grinnell, Williams replied, "No, I didn't put them with the rest of the clothing" and indicated with a nod of his head northward toward a Skelly station saying, "I put the shoes right up there, that filling station * * * I bought \$2.00 worth of gas" and "I went around behind the building and dropped the shoes into an empty cardboard box." He further described the shoes or boots made of brown leather. A search for them did not reveal the shoes, but the station attendant recognized Williams as the party that stopped there on Christmas eve. Captain Leaming further testified that Williams told of leaving some clothes and a blanket at the rest area west of Grinnell and that when they approached the Mitchellville turn-off, he said, "I am going to show you where the body is" and proceeded to do so, although he missed the correct back road the first try. Officer Nelson corroborated this testimony, and other officers in contact with Captain Leaming aided in the search and recovery of the body.

[11] Whether the officers questioned Williams on the trip to Des Moines and whether they had agreed to come straight back to Des Moines with the defendant without any stops, were questions of fact, and in this so-called swearing contest the fact finder must resolve the questions. We find there is substantial evidence to support the trial court's finding of fact, and as to the jury's determination of which version was correct there can be no doubt. It is only in an extreme case, where the findings are without substantial support or the record is clearly against the weight of the evidence, that we will interfere with the fact-finding of the court or jury. *State v. Everett*, Iowa, 157 N. W. 2d 144 (1968); *State v. Hardesty*, 261 Iowa 382, 394, 153 N. W. 2d 464, 472 (1967); *Greenwald v. Wisconsin*, supra, 390 U. S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77. Therefore, unless the trial court erred by failure to consider all necessary circumstances to resolve the questions of waiver, the judgment rendered herein must be affirmed. We find no such failure evident in these proceedings.

IV. The circumstances to be considered in determining waiver are many and varied depending upon each particular case. In *State v. McClelland*, supra, 164 N. W. 2d 189, we reviewed the evidence revealing the totality of circumstances and declared, despite the fact that the testimony did not show an express waiver of appellant's right to remain silent and to the assistance of counsel, the attendant circumstances clearly demonstrated the wholly voluntary nature of defendant's incriminating statement, and that they were admissible in evidence. We reaffirmed our position in this regard in *State v. McPherson*, Iowa, 171 N. W. 2d 870, and upheld the conviction because the proof of compliance with the federal Miranda mandates was sufficient to justify the ruling. Also see *State v. Davis*, 261 Iowa 1351, 157 N. W. 2d 907.

In *State v. Blanche*, 454 P. 2d 841 (Wash. 1969), a case quite similar to the case at bar, the court considered the argument that incriminating statements made by defendant while flying back to Seattle under police escort were inadmissible, even though he had been given the Miranda warnings, because his right to the assistance of counsel at all times could not be met in the flight across the country. It rejected the contention and held, after defendant had [sic] been duly warned, the attendant facts demonstrated that the defendant's statements were made of his free will and while he was aware of his rights including the right to assistance of counsel before making a statement, that he request-

ed no assistance of counsel, voluntarily gave the statements, and thus had no cause for complaint. Also see *People v. Robles*, 27 N. Y. 2d 155, 314 N. Y. S. 2d 793, 263 N. E. 2d 304.

[12, 13] Without an unnecessary review here of all the attendant facts in the case at bar, we are satisfied there is substantial evidential support for the finding that the defendant was given due and timely warnings under *Miranda*, that he understood them and had legal advice as to his right to remain silent and right to assistance of counsel before making any statement to the authorities, that he was not coerced or intimidated by the officers, and his statements were not secured by trickery or fraud. It seems clear, after considering the statement of Captain Leaming about the difficulty in finding the body after a snowfall and the statement of his own attorney that he would have to show where she was, the decision to reveal her whereabouts during the trip was made by his own free will. This, we hold, he could do despite the instructions of his attorneys and even their understanding with the officers that no such information would be obtained during the trip. What really caused his decision to speak out, only he knows, but we are satisfied there were sufficient proper reminders to justify the decision, and that it could not be said as a matter of law that Captain Leaming's suggestion was so improper as to make the admissions inadmissible. Books may be written on what is or is not proper police procedure in this regard, but we hold here it was not cause to reject the evidence adduced on this trip.

[14, 15] Although there are some jurisdictions that seem to hold there could be no waiver of one's rights except in the presence of his attorney, we do not subscribe to that view. See *United States ex rel. Magoon v. Reincke*, D. C., 304 F. Supp. 1014. We hold that, without a clear showing of mental incapacity of weakness, *the will of the accused* when intelligently and voluntarily exercised is paramount.

It is true, the reporter in 164 N. W. 2d 330 in headnote 12 concludes a "Miranda waiver taken in absence of defendant's attorney and without his permission was ineffective" and from this appellant contends we in *State v. Hancock*, supra, adopted the rule that no waiver could be made by an accused without his lawyer's consent. This is not true, and a careful reading of *Hancock* will reveal we dealt there with a limited stipulation for a specific purpose, that an attempt to introduce evidence of admissions beyond the polygraph test violated the agreement and was not waived by the accused. It is not authority for the prop-

osition that waiver in this jurisdiction is dependent upon the presence of counsel at the time.

V. Appellant's contention that the protection furnished by the Sixth Amendment covers also any testimony offered by the State which was obtained by, through, or under the officers to whom the demonstrations, statements and confessions, were made, would appear to have merit, but in view of our rejection of his claim regarding the information given Captain Leaming, we need not consider further this complaint. If he waived as to the officers in the car, he also waived as to those who obtained information through them.

VI. Having carefully reviewed all the authorities cited by appellant and the State and many we have found which deal with waiver of constitutional rights as raised herein since *Escobedo* and *Miranda*, we must conclude that the trial court did not err in overruling defendant's motion to suppress and in its rulings on objections to evidence of statements, demonstrations, and admissions against interest due to waiver. Further complaint as to the court's instructions in appellant's motion for a new trial have been considered and are deemed without merit. There being no error, the conviction and judgment must be affirmed.

Affirmed.

MOORE, C. J., and LeGRAND, REES and UHLENHOPP, JJ., concur.

STUART, RAWLINGS, MASON and BECKER, JJ., dissent.
STUART, Justice (dissenting).

After more "soul searching" than should be necessary in an appellate decision, I reluctantly dissent from the majority opinion. This conclusion was made doubly difficult because the evidence so clearly connects defendant with this most reprehensible crime and because I personally believe there is nothing morally or legally wrong in permitting police officers to use psychology to secure incriminating statements from a defendant without counsel.

Since *Miranda v. Arizona* (1966), 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, however, the United States Supreme Court has held otherwise and I cannot escape the conclusion that when the totality of the circumstances test is applied to this evidence, accepting the officer's version of the trip from Davenport, the spirit, if not the letter of *Miranda* and subsequent decisions has been violated here. I do not believe the state sustained the bur-

den of showing defendant knowingly and intelligently waived his privilege against self incrimination and his right to have counsel present.

I doubt if the majority would have reached this result if defendant's crime had been less reprehensible. There is a natural tendency to make a tenuous finding of fact to avoid the application of a rule of law in a hard case. It seems to me the rule of law is unsound and that in the long run justice would best be served by applying it in accordance with its spirit and exposing the perverse result of its application.

I accept the statement of the law as set out in division I of the majority opinion, but cannot agree the evidence shows a knowing and intelligent waiver of the constitutional rights referred to therein.

Let us examine the circumstances under which defendant's incriminating statements were made. Defendant, an escapee from a mental institution with a deeply religious nature, called his attorney from Davenport. On advice of counsel he agreed to surrender himself to the Davenport police. Counsel advised the Des Moines police of these arrangements. After defendant turned himself in he talked to Mr. McKnight who advised defendant not to talk until he had talked with him. The officer heard that admonishment. The trial court found an agreement was made between defense counsel and police officials that defendant was not to be questioned on the return trip to Des Moines. Defendant was also advised by Mr. Kelly, a Davenport attorney, not to talk until he arrived in Des Moines. Mr. Kelly was denied permission to ride to Des Moines in the police car with defendant.

Captain Leaming, of the Des Moines city police, picked defendant up in Davenport. He testified that after he gave defendant the Miranda warnings, he reminded him he was represented by counsel and "that I wanted him to remember this because we would be visiting between here and Des Moines." He also stated defendant told him several times during the trip: "When I get to Des Moines and see Mr. McKnight I am going to tell you the whole story."

He also testified: "I did not question Mr. Williams on the ride to Des Moines; * * * that I had considerable conversation with Mr. Williams as to religion and what the people thought of him in Des Moines. * * *

"Well, Mr. Williams was very talkative, and he was asking me who we had talked to that were friends of his, if we talked to the Reverend from the church, if we talked to Mr. John Searcy, if we had checked for fingerprints in his room at the YMCA, and we discussed religion. We discussed intelligence of other people. We discussed police procedures, organizing youth groups, singing, playing a piano, playing an organ, and this sort of thing.

"Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'

"At that point Mr. Williams asked me why I should feel that we would be going right by it. I told him that I knew it was somewhere in the Mitchellville area and I didn't know exactly where, but I did know that it was somewhere in the Mitchellville area, and I felt that we should stop and look.

"I stated further, 'I do not want you to answer me, I don't want to discuss it any further. Just think about it as we're riding down the road.' * * *

"Well, we had further discussions about people and religion and intelligence and friends of his, and what people's opinion was of him and so forth. And, oh, some distance still east of the Mitchellville turn-off he said, 'I am going to show you where the body is.' He said, 'How did you know that it was by Mitchellville?' I told him that this was just part of our procedure, that this was our job to find out such things and I just knew that it was in that area. * * *

"Q. Now let me ask you this: When you said to him, you say you said to him it's snowing out here, bad weather, isn't that what you said to him? A. Yes, sir.

"Q. He didn't ask you that, did he? A. No.

"Q. Didn't you say that to him to induce him to show you where the body was? A. I was hoping he would.

"Q. You was hoping he would? A. Yes, sir.

"Q. So you wanted to make it appear to him that it might be harder or impossible to get out there the next day, you told him there was going to come a big snow, didn't you? A. No, I didn't tell him there was going to come a big snow. I asked him to observe the weather, observe the visibility, observe it sleeting and it raining and they're predicting snow for tonight.

"Q. And that was for the purpose of inducing him to talk, wasn't it? A. Telling the truth.

"Q. Well, I said, wasn't that for the purpose of getting Mr. Williams to talk? A. Well, I was hoping he would tell me where the body was, Mr. McKnight, absolutely. * * *

"Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you? A. I was sure hoping to find out where that little girl was, yes, sir. * * *

"Q. Well, I'll put it this way: You was hoping to get all the information you could before Williams got back to McKnight, weren't you? A. Yes, sir."

It seems to me the only reasonable conclusion is that Captain Leaming embarked on a psychological campaign to obtain as much information from this mentally weak defendant as possible before letting him talk to his counsel. The fact that he was able to get the information by implanting ideas in defendant's mind without direct questioning is unimportant. If it were not for the agreement made with defendant's counsel, I personally would have no objection to this technique. However, I believe the law to be otherwise. There was no claim of verbal waiver of counsel. I do not think it was shown by the totality of the circumstances.

The aspect of the case which gives me the most concern was the obvious effort of the police officers to evade the good faith attempt of defendant's counsel to cooperate with the police department. While I can understand and sympathize with Captain Leaming's desire to recover the little girl's body as soon as possible, actions like those taken here can only cause defense counsel to lose confidence in the trustworthiness of police officers and discourage reasonable and sound approaches to criminal practice.

In my opinion the majority position in *State v. Hancock* (1969, Iowa), 164 N. W. 2d 330, 337, has more application to this case than the majority is willing to concede. There defendant's counsel agreed to a polygraph test and its admissibility into evidence. Defendant signed a waiver of her constitutional rights in the presence of the operator. After the test was completed defendant under the urging of the operator made certain admissions. A majority of the court in a brief concurring opinion held the state overreached defendant in offering the testimony as to admissions made after the test. The Miranda waiver was not proper because it was taken in the absence of defendant's attorney after a limited stipulation for a different specific purpose.

I would not favor a rule which would make it impossible for a defendant to waive his constitutional rights in counsel's absence, but when counsel and police have agreed defendant is not to be questioned until counsel is present and defendant has been advised not to talk and repeatedly has stated he will tell the whole story after he talks with counsel, the state should be required to make a stronger showing of intentional voluntary waiver than was made here.

I would agree with the statement in *State v. Johns* (1970), 185 Neb. 590, 177 N. W. 2d 580, 584-585:

"We hold that where the police or prosecutors know that a defendant, formally charged with a felony, is represented by counsel who has requested that no statements be taken from the defendant; and where the defendant, after being advised of his Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from the defendant by custodial interrogation designed to produce incriminating statements, and undertaken before the defendant has been given an opportunity to consult with his lawyer, are inadmissible, in the absence of an effective waiver.

"Where both the defendant and his counsel have previously attempted to invoke the defendants' constitutional right to counsel; then at the very least, a 'heavy burden' rests on the state to demonstrate that the defendant knowingly and intelligently waived his right to counsel. On the facts in this case, that burden was not met."

I believe this case must be reversed under the law as it now stands in the decisions of the United States Supreme Court.

RAWLINGS, Justice (dissenting).

In my opinion the facts set forth in Justice Stuart's dissent lead unalterably to the conclusion he reaches.

The statements made to defendant on the trip from Davenport to Des Moines were nothing less than a species of subtle but effective persuasion.

Whether these statements by Officer Leaming be classified as declaratory or interrogatory in form, they were designed to elicit a statement or confession by defendant.

The inculpatory statements made by defendant as a result thereof should have been excluded.

In support hereof see *Blackburn v. Alabama*, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242, and cases cited.

MASON AND BECKER, JJ., join in this dissent.

On October 12, 1972, the following Petition for Writ of Habeas Corpus was filed in the United States District Court, Southern District of Iowa:

Case No. 72-257-2

ROBERT ANTHONY WILLIAMS

a/k/a ANTHONY ERTHEL WILLIAMS

Number 103263,

Petitioner,

vs.

LOU V. BREWER, Warden of the Iowa State Penitentiary at
Fort Madison, Iowa,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

1. Place of detention Iowa State Penitentiary, Fort Madison, Iowa

2. Name and location of court which imposed sentence Polk County District Court, Des Moines, Iowa

* * *

4. The date upon which sentence was imposed and the terms of the sentence:

(a) May 14, 1969. Imprisoned for life at hard labor in the Iowa State Penitentiary at Fort Madison, Iowa

* * *

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Evidence was used against me in my trial that was obtained in violation of the *Fifth Amendment* to the United States Constitution in that such evidence was obtained from me after I had invoked my privilege under the *Fifth Amendment* to remain silent.

(b) I was denied the assistance of counsel during the interrogation period and thus the evidence used against me at trial obtained during this period was in violation of my *Sixth Amendment* right to the assistance of counsel.

13. State concisely and in the same order the facts which support each of the grounds set out in (12):

(a) (1) The trial court found as a fact that my attorney and the Des Moines Police Department had entered into an agreement whereby the police agreed that there would be no questioning until I was returned to Des Moines from Davenport and was in the presence of my attorney.

(a) (2) I informed Detective Leoming [sic] of the Des Moines Police Department, who was returning me to Des Moines, that I would not talk until I was in the presence of my lawyer and yet he continued conversing with me.

(a) (3) Detective Leoming [sic] testified that he was hoping to get all the information he could out of me before I got back to my lawyer.

(b) I did not waive my right to have counsel present during the trip between Davenport and Des Moines, nor was I afforded the opportunity to have counsel present.

20. Do you make any complaint or claim that any admission statement or confession given by you and used against you at any stage of any proceeding leading to your commitment, was involuntarily made or made as the result of threats, promises, or coercion?

Yes

If your answer is yes, state the substance of such claim.

Admissions made by me as to the whereabouts of the body of Pamela Powers and certain articles of her clothing were made at a time when I was without the assistance of counsel and at a time when I had expressed my desire to remain silent.

22. Do you make any claim or complaint that any physical evidence used against you at any stage of any proceeding resulting in your commitment was illegally obtained, the result of an illegal search or seizure, or that the State knowingly used perjured testimony or that the State did suppress evidence tending to prove you innocent?

Yes

If your answer is yes, state the nature of such claim.

The location of the body of Pamela Powers and related facts were obtained from me at a time when I was without the assistance of counsel and at a time when I had expressed a desire to remain silent.

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

/s/ Robert Anthony Williams
ROBERT ANTHONY WILLIAMS
A/K/A ANTHONY ERTHELL WILLIAMS

Signature of Petitioner

On the 28th day of March, 1974, the MEMORANDUM AND ORDER of the United States District Court, Southern District of Iowa was filed and is set out at Appendix F, Supplemental Appendix, Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NUMBER 72-257-2

NOTICE OF APPEAL

ROBERT ANTHONY WILLIAMS,
A/K/A ANTHONY ERTHELL WILLIAMS

Petitioner,

vs.

LOU V. BREWER, Warden of the Iowa State Penitentiary at
Fort Madison, Iowa,

Respondent.

Notice is hereby given that respondent Lou V. Brewer, Warden of the Iowa State Penitentiary at Fort Madison, Iowa, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order sustaining petitioner's writ of habeas corpus entered in this action on the 28th day of March, 1974.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

/s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General,
State House
Des Moines, Iowa

Attorneys for Respondent.

On the 31st day of December, 1974, the OPINION AND JUDGMENT of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix A, Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

CIVIL

ROBER ANTHONY WILLIAMS, a/k/a
ANTHONY ERTHEL WILLIAMS,

Appellee,

vs.

LOU V. BREWER, WARDEN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION
THE HONORABLE WILLIAM C. HANSON
CHIEF JUDGE PRESIDING

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

COMES NOW the Appellant, Lou V. Brewer, Warden, pursuant to Rule 40 of the Federal Rules of Appellate Procedure and petitions for rehearing of this case and suggests to the Court pursuant to Rule 35 of said Rules that said rehearing be ordered en banc and states to the Court in support of said Petition and Suggestion as follows:

1. That on December 31, 1974, a Three Judge Panel of this Court composed of Senior Circuit Judge Vogel and Circuit Judges Ross and Webster filed its Memorandum Decision affirming the United States District Court for the Southern District of Iowa, The Honorable William C. Hanson, Chief Judge, which sustained Petition for Writ of Habeas Corpus on grounds that incriminating statements were obtained in violation of Petitioner's Fifth and Sixth Amendment rights, Judge Webster dissenting.

2. That it appears the Court has misapprehended the thrust of this Court's decision in *Stidham v. Swenson*, 16 Cr. L. 2261 (8th Cir. 11/26/74) in its application of 28 U. S. C. Section 2254 (d).

3. That it appears to counsel that while this Court has correctly stated the rule for determining whether an individual has waived his constitutional rights, the Court has failed to recognize or overlooked relevant record facts that clearly establish more than sufficient evidence of waiver of constitutional rights; thus it appears this Court has incorrectly interpreted or misapplied the prosecution's burden of proof of waiver under the rule of *Miranda v. Arizona*, 384 U. S. 436 (1966), as enunciated by this Court in *Hughes v. Swenson*, 452 F. 2d 866 (8th Cir. 1971).

4. That it appears to counsel that the facts relied upon by this Court to decide the issue of waiver are, in the main, irrelevant and immaterial to that issue.

5. That consideration of this Petition for Rehearing by the full Court is necessary to secure and maintain uniformity of this Court's decisions due to the inconsistency of the Court's decision in this case with this Court's decisions in *Stidham v. Swenson*, supra, and *Hughes v. Swenson*, supra.

ARGUMENT

I

Statement of the Case

Appellee was convicted by jury verdict of the crime of Murder in violation of Section 690.2, 1966 Code of Iowa. On May 14, 1969, appellee was sentenced in the Polk County Iowa District Court to a term of life imprisonment in the Iowa State Penitentiary, Fort Madison, Iowa. On December 15, 1970, the Iowa Supreme Court affirmed appellee's conviction. On March 9, 1971, the Iowa Supreme Court denied appellee's application for rehearing.

On October 16, 1972, appellee filed a Petition for Writ of Habeas Corpus in the United States District Court of Iowa, alleging his constitutional rights guaranteed by the 5th, 6th and 14th Amendments of the United States Constitution had been violated. Subsequent to an Order to Show Cause and Return, the Court, Honorable William C. Hanson, entered a Memorandum and Order sustaining the Petition for Writ of Habeas Corpus (Order of March 28, 1974). On April 11, 1974, appellant filed Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. After submission of briefs and oral argument on the matter, this Court has affirmed by memorandum opinion filed December 31, 1974, with one Judge of the panel dissenting.

II

Statement of the Facts

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa (T.T. p. 4). When Pamela Powers, age 10, failed to return from a visit to the washroom a search was started for her, but she could not be found in the building, and the police were called (T.T. pp. 7-8). About that time or between 1:00 and 1:30 P.M., the appellee, Williams, who had a room on the seventh floor of the building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket similar to those provided in the YMCA rooms (T.T. pp. 17-20). He spoke to several persons on the way out, explaining to one party that he was carrying a mannequin (T.T. p. 89). He requested the aid of a 14-year-old boy to open first the Locust Street door and then the door to his Buick automobile parked on the south side of the street facing east. This boy testified that when the appellee Williams placed the bundle in the passenger seat he "saw two legs in it and they were skinny and white" (T.T. pp. 60-63). Efforts by YMCA personnel to view the object were thwarted by appellee as he closed and locked his car doors and drove away. They also called for the police (T. T. p. 91).

On December 25, 1968, appellee's car was found in Davenport, Iowa approximately 160 miles east of Des Moines, and a search was instituted for him. At about this time, a warrant for appel-

lee's arrest on a charge of child-stealing was issued and filed in Polk County (²R. pp. 16, 108).

On the morning of December 26, 1968, appellee called his Des Moines attorney, Mr. Henry McKnight, from Rock Island, Illinois. Mr. McKnight advised appellee to surrender himself to the Davenport police (R. p. 67). At approximately 8:40 A.M. on December 26, 1968, appellee did surrender himself to the Davenport police. Lt. John Ackerman of the Davenport police advised appellee of his constitutional rights under *Miranda* (R. p. 16).

Appellee's counsel, Mr. McKnight, came to his office at about 9:00 A.M., December 26, 1968. At that time, Mr. McKnight received a call from the appellee in Davenport, Iowa (T. T. pp. 355, 356). Mr. McKnight told appellee that he would be picked up in Davenport, that he would not be mistreated or grilled, and that they would talk it over in Des Moines. McKnight's portion of the conversation was carried on in the presence of Des Moines Chief of Police Wendell Nichols and Detective Cleatus Leaming.

Mr. McKnight further advised appellee that the appellee would have to tell the officers the location of the body. Mr. McKnight told the appellee that when he got back to Des Moines the appellee could tell him the story and then he would tell the police the whole story (T. T. p. 265).

The appellee was further instructed not to make any statements until returning to Des Moines and his attorney.

As a result of these conversations, it was agreed that Detective Leaming would go to Davenport to pick up appellee, without Mr. McKnight and bring him back to Des Moines. On December 26, 1968, Leaming, accompanied by Detective Arthur Nelson, drove from Des Moines to Davenport to pick up appellee.

At 11:00 A.M., on the same day, appellee was arraigned before state court Judge Metcalf in Davenport as a fugitive to be held on the Polk County warrant and notified of the charge of child-stealing against him. Judge Metcalf again advised the appellee of his rights (T. T. p. 204).

¹ Trial Transcript of Evidence, hereinafter referred to as "T.T.".

² Record on appeal to Supreme Court of Iowa, hereinafter referred to as "R".

The appellee was then granted a conference with an attorney, Mr. Thomas M. Kelly, Jr. After the conference, Mr. Kelly advised the Davenport Police that appellee wished to remain silent and await the arrival of the Des Moines Police on advice of his Des Moines counsel (T. T. pp. 205, 206).

After lunch, appellee, Mr. Kelly, Leaming, Nelson and Ackerman assembled in the latter's office where again appellee was advised of his rights (T. T. pp. 206-207). Appellee was then afforded two separate conferences with Mr. Kelly taking the total time of about one hour (T. T. pp. 216, 217). Captain Leaming, Detective Nelson and appellee then left for Des Moines at about 2:00 P.M.

With Nelson driving and Leaming and appellee in the back seat, the trio proceeded westbound on I-80 to Des Moines. Shortly out of Davenport, appellee initiated a conversation with Leaming. The talk included general discussion concerning religion, appellee's reputation, and various other topics including appellee's friends, his Reverend, a Mr. Searcy, whether the police had checked for fingerprints in appellee's room, the intelligence of other people, police procedures, organizing youth groups, singing, playing a piano, playing an organ, "and this sort of thing" (T. T. p. 224).

Appellee asked Leaming whether he hated him or wished to kill him; to which Leaming responded: "I myself had religious training and background as a child and that I would probably come more near praying for him than I would to abuse him or strike him" (T. T. p. 222). All of this conversation had been initiated by appellee or was in direct response to appellee's questions.

Captain Leaming then told appellee that he wanted appellee to think about something while traveling. The hazardous weather conditions and the snow might render the finding of deceased's body difficult. You are the only person that knows where the body is. She should be given a Christian burial and that they should stop and locate the body on the way rather than waiting until morning (T. T. pp. 224, 225). Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." This subject was not mentioned again until, while approaching the Grinnell exit on Interstate 80, the appellee asked "Did you find her shoes?" Leaming replied that he did not know and appellee then directed the officers to a Skelly Station where he had disposed of the shoes (T. T. pp. 225-226). They searched but were unable to locate the shoes. Upon returning to the Interstate appellee asked Leaming

if he had found the blanket (T. T. pp. 229, 230). Whereupon appellee told the officers where he had placed the blanket, but the B. C. I. agent told him that the blanket had been found.

They then returned to Interstate 80 and proceeded west to Des Moines. After further discussion about "people", etc., and some distance east of Mitchellville, Iowa, the appellee said, "I am going to show you where the body is" (T. T. pp. 231, 232). He then proceeded to direct the officers to the location of the body (T. T. pp. 235-242). The body was found and the identification bureau of the Des Moines Police Department then took over at the scene.

III

Discussion

This Petition for Rehearing En Banc is concerned with: (1) a waiver of an individual's 5th Amendment right to remain silent and 6th Amendment right to assistance of counsel while in police custody; and, (2) the application of 28 U. S. C. 2254 (d). This Court, in its opinion of December 31, 1974, Judge Webster dissenting, decided that appellee did not waive these constitutional rights and that his rights had been violated. The opinion of this Court appears to conflict in fact and law with prior decisions of this Court and other federal authorities on both the questions of waiver and the application of 28 U. S. C. 2254 (d).

The majority found that the record indicates with regard to the facts challenged here that the state court did not resolve the merits of the factual disputes. The majority further states that the record of the state proceedings reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its finding. Thus, the presumption of correctness to be given findings of the state court created by 28 U. S. C. Section 2254 (d) is destroyed.

Since the discrepancies and ambiguities of record facts go directly to the ultimate issues in this case, it is imperative that these factual ambiguities be finally resolved before the ultimate issues are determined. This Court, in *Stidham v. Swenson*, 16 Cr. L. 2261 (8th Cir. 11/26/74) seems to have spoken to that issue when they remanded to the district court for an evidentiary hearing to adequately develop material facts on crucial evidentiary points.

Surely if the facts enunciated in *Stidham* were deserving of further inquiry, the factual discrepancies and ambiguities of the instant case merit resolution. As the Honorable Judge Ross stated at oral argument, this case is important to historical precedent. To determine such an important case without the full benefit of completely developed facts would seem to fly in the face of the Court's reasoning in *Stidham*.

It is our contention that if factual discrepancies and ambiguities exist that are crucial to the determination of the ultimate issues more is required than a study of the bare record to determine the factual dispute. As suggested by the Honorable Judge Webster in dissent, an independent evidentiary hearing should be held before issues of credibility of witnesses are determined by a federal judge. Since the issues of waiver and voluntariness rise or fall on disputed facts which the triers of fact found adversely to Williams, it appears mandatory that an evidentiary hearing be held.

An individual may waive constitutionally guaranteed rights. *Miranda v. Arizona*, 384 U. S. 436 (1966). The test of waiver is clear—whether an individual, with knowledge of his rights, intelligently and knowingly declines to exercise them. *Hughes v. Swenson*, 452 F. 2d 866 (8th Cir. 1971). The test has also been defined as an intentional relinquishment or abandonment of a known right. *Johnson v. Zerbst*, 304 U. S. 458 (1938). The burden of proof is upon the prosecution to show by recorded facts that an individual did intentionally, knowingly, and voluntarily choose not to exercise his right to remain silent or to an attorney. *Miranda*, supra. The burden is a heavy one especially where incriminating statements are obtained by the police. *Miranda*, supra. In the absence of an express waiver, the totality of surrounding circumstances must be assessed to determine whether an individual intelligently and knowingly elected to waive his rights.

In this Court's decision of *Hughes v. Swenson*, supra, where an accused was found to have been adequately warned of his rights under *Miranda* and asserted that he understood his rights, this Court decided that appellant had waived his constitutional right to counsel. The rule enunciated by this Court is as follows:

"Having concluded that appellant was not only warned as required by *Miranda* but that he also asserted that he understood his rights, the legal question remains whether such an assertion constitutes a valid waiver of counsel.

* * *

"... if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid."

That appellee had been more than adequately warned of his *Miranda* rights appears conceded by the District Court and the majority of this Court and is clear under the record. Full *Miranda* warnings were given appellee on three separate occasions, the final warning by Captain Leaming immediately prior to departure for Des Moines. That appellee understood he had the right to an attorney cannot be denied under the record. As was present in *Hughes*, appellee here expressly acknowledged that he understood his rights and, in fact, exercised his right to counsel by retaining Attorney McKnight in Des Moines and Attorney Kelly in Davenport. Further, he conferred privately with Attorney Kelly twice in Davenport. That he understood his right to remain silent is equally supported by the facts. Aside from his express statement that he understood his rights, he was admonished by Attorney McKnight not to talk to the police and knew that Attorney Kelly had advised the police that Williams would remain silent on the trip to Des Moines.

Under the rule enunciated in *Hughes* above, the fact that the defendant is "effectively advised of his rights" is a relevant and significant factor in determining whether an accused waived his constitutional rights. The District Court and the majority in this Court concluded that no facts were established by the prosecution to support the conclusion that appellee had waived his rights.

It appears the Court overlooked the significant factors of adequate *Miranda* warnings and assertion by the accused of his understanding of said rights as mandated by *Hughes*.

That appellee thereafter "intelligently and understandingly" declined to exercise his rights is adequately supported by the record. It is suggested that the Court overlooked the following facts and thus narrowed the facts upon which they made their determination.

1. That Williams initiated conversations with Officer Leaming pertaining to the crime and freely conversed with Leaming on many topics.

2. The incriminating statements made by Williams concerning the shoes, blanket, and body were not made in response to any questions, but were spontaneous.

3. Williams had been advised by his attorney that he would have to divulge the location of the body.

4. After Leaming made the statement pertaining to the weather and the location of the body, he stated to Williams: "I do not want you to answer me. I don't want to discuss it any further."

These facts indicate clearly that the heavy burden upon the State to establish waiver was met.

The test of waiver is a subjective one. Only the accused can waive his rights, not his counsel. It appears that the Court relied on irrelevant facts that have no bearing upon whether Williams knowingly and intelligently declined to exercise his rights.

CONCLUSION

For all the above reasons, Appellant respectfully requests that this case be restored to the Court's calendar for reargument and resubmitted to the Court en banc.

RICHARD C. TURNER
Attorney General of Iowa

By /s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorneys for Appellant.

(Certificate of Service omitted)

On the 30th day of January, 1975, the ORDER denying Petition for Rehearing En Banc and for Rehearing of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix C, Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1300

CIVIL

ROBERT ANTHONY WILLIAMS, a/k/a
ANTHONY ERTHEL WILLIAMS,

Appellee,

vs.

LOU V. BREWER, WARDEN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION
THE HONORABLE WILLIAM C. HANSON,
CHIEF JUDGE PRESIDING

APPLICATION FOR STAY OF MANDATE

COMES NOW the Appellant, Lou V. Brewer, pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure and makes application for a Stay of Mandate pending application to the Supreme Court for a writ of certiorari as follows:

1. That on December 31, 1974, a Three Judge Panel of this Court composed of Senior Circuit Judge Vogel and Circuit Judges Ross and Webster filed its Memorandum Decision affirming the United States District Court for the Southern District of Iowa, The Honorable William C. Hanson, Chief Judge, which sustained Petition for Writ of Habeas Corpus on grounds that incriminating statements were obtained in violation of Petitioner's Fifth, Sixth and Fourteenth Amendment rights, Judge Webster dissenting.

2. That on January 14, 1975, Appellant filed a Petition for

Rehearing and Suggestion for Rehearing en banc.

3. That if this Court denies Appellant's Petition for Rehearing and Suggestion for Rehearing en banc. Appellant will Petition for Writ of Certiorari to the United States Supreme Court.

4. That Appellant believes that important issues will be presented in said Petition for Writ of Certiorari and Appellant believes there is a reasonable chance that the writ of certiorari will be granted.

5. That the granting of a Stay of Mandate will be of no harm to appellee.

6. That in view of appellee's history of acts dangerous to society, his continued incarceration pending final resolution of this case is necessary to the welfare of society.

WHEREFORE, Appellant respectfully requests that the Stay of Mandate Pending Application to the Supreme Court for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

By /s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General

(Certificate of Service Omitted)

On the 6th day of February, 1975, the ORDER staying mandate of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix D, Petition for Writ of Certiorari.

The applicable statutes, Amendment 5, Constitution of the United States; Amendment 6, Constitution of the United States; Amendment 14, Constitution of the United States; Title 28, U. S. C. § 2254 (d), and Title 18, U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968 are set out in Appendix E, Petition for Writ of Certiorari.

The following excerpts of testimony are taken from the transcript of the Preliminary Hearing held January 10, 1969, in the Municipal Court of City of Des Moines, Polk County, Iowa, before the Honorable Luther T. Glanton, Jr., Judge:

DETECTIVE CLEATUS M. LEAMING

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANSEN:

* * *

[Objection made during testimony of Detective Leaming].

Q. Now, shortly after you got on the freeway did Mr. Williams ask you anything?

Mr. McKnight: Just a moment. We are going to object to any conversation with Mr. Williams under the case of Esposito versus the State of Illinois for the reason this man was without counsel and we put the burden upon the State to show that anything Williams said was said within keeping of the Miranda case and the burden is upon them [P. T. p. 23].¹

* * *

DISCUSSION IN CHAMBERS

* * *

Mr. Hansen: He was completely advised of his rights and he was allowed to talk to this Mr. Kelly.

Mr. McKnight: But he had an agreement with me.

Mr. Hansen: Who?

Mr. McKnight: The Detective Department.

¹ The abbreviation P. T. shall stand for Transcript of the Preliminary Hearing held January 10, 1969.

Mr. Hansen: Leaming said he didn't have an agreement with you.

The Court: I'll tell you what I'm going to do. At the state of the record now the Court is not going to permit any testimony that came from this defendant at the state of the record now.

. . .

DIRECT EXAMINATION (Continued)

BY MR. HANSEN:

Q. Now, please answer this yes or no. On the way back from Des Moines did Mr. Williams ask you questions?

Mr. McKnight: Just a moment. That will be objected to, any conversation between he and this witness. The conversation is incompetent, irrelevant and immaterial under the Miranda decision.

The Court: You may answer that yes or no.

A. You said on the way back?

Mr. McKnight: Now just a moment.

Mr. Hansen: Reread the question.

(The last question was read back by the court reporter.)

A. Not from Des Moines, no.

Q. On the way back to Des Moines?

A. To Des Moines, yes.

Q. State whether or not you had any conversation with Mr. Williams on the way back to Des Moines.

Mr. McKnight: That will be objected to for all the reasons heretofore urged.

The Court: You may answer.

A. Yes.

Q. And as a result of those conversations did you make any stops?

Mr. McKnight: Just a moment. That is going to be objected to. Any information that he got as a result of this conversation is in violation of this fellow's constitutional rights.

The Court: For the purpose of this hearing, Mr. McKnight—I think in the trial of the case you'll have something there, but for the purpose of this hearing the Court will permit this officer to state what he did . . . [P. T. pp. 37-39].

On March 25, 1969, the following Motion to Suppress was filed in the District Court of the State of Iowa in and for Polk County:

MOTION TO SUPPRESS

COMES NOW the Defendant and moves the court to suppress the testimony of the following witnesses hereinafter set forth for the reason that their interrogation of the Defendant and the way the testimony was obtained amounted to a denial of assistance of counsel to the Defendant in violation of the Sixth Amendment to the Constitution of the United States as made obligatory upon the States by the Fourteenth Amendment to the United States Constitution and said testimony and said witnesses are set out as follows:

. . .

7. That the entire testimony of C. M. Leaming, except the first 12½ lines thereof as shown in the Minutes attached to the Indictment, be suppressed for the reason that C. M. Leaming obtained the information to give the testimony from an interrogation of the defendant in violation of his agreement with the Defendant's counsel, Henry T. McKnight, that he would go from Des Moines to Davenport and return the defendant to Des Moines and that no questioning of the Defendant would be made until the Defendant was returned to Des Moines where he had assistance of counsel and that said agreement was not kept and interrogation of the Defendant was made from the beginning of the trip from Davenport to Des Moines and it was a denial of the assistance of counsel to the Defendant in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment.

. . .

WHEREFORE, Defendant prays that the Motion to Suppress be sustained.

HENRY T. McKNIGHT

Attorney for the Defendant
506 East Walnut Street
Des Moines, Iowa 50309
243-5293

The following excerpts of testimony are taken from the transcript of the Suppression of Evidence Hearing held April 2, 1969, in Polk County District Court before the Honorable J. P. Denato, Judge.

The Court: The matter before the Court this morning is a motion to suppress evidence on the part of the Defendant.

Mr. McKnight, are you ready to proceed?

Mr. McKnight: Ready to proceed, Your Honor. I wanted to make this reservation to the Court: In order so the Court would understand, Mr. Kelly, attorney in Davenport, was supposed to be one of the witnesses. I had a phone call from him and he had drawn a jury in Davenport, and he said it would just be impossible for him to honor the subpoena, and I said I wouldn't press it, because he was trying a case and I guess that would let him out. But I still want to go on with what we've got and get it over with. All right, Your Honor?

The Court: Very good.

Mr. McKnight: Call Chief of Police Nichols. [S. T. p. 2]²

* * *

Q. What is your business or occupation?

A. Chief of Police, Des Moines, Iowa. [S. T. p. 3].

* * *

² The abbreviation S. T. shall stand for the transcript of the Suppression Hearing held April 2, 1969.

Q. Chief, I call your attention to the day after Christmas, which is December 26, 1968, and I'll ask you whether or not you saw me about five minutes to nine or nine, a. m., that morning?

A. I did.

Q. And when you saw me, I mean Henry T. McKnight?

A. Yes.

Q. Now were you or your department endeavoring at that time to apprehend Robert Anthony Williams?

A. Yes.

Q. Did you at that time know where Mr. Williams was?

A. I don't think we knew at that time for sure. We felt he was in—and maybe we got this from you, I don't know, but somewhere in the vicinity of Davenport. We found his car there.

Q. Yes. Do you recall whether or not on that morning that Henry T. McKnight came into the Detective Leaming's office and while he was there, a telephone call was made from Davenport?

A. Yes.

Q. Were you present?

A. Yes.

Q. Did also you hear Henry T. McKnight talk to Williams over the long distance phone call from Davenport?

A. I assume it was Williams. I had good reason to assume.

Q. You had good reason to believe. Were you all informed that Williams had surrendered?

A. Yes.

Q. Had I told you that prior thereto that I had asked him to surrender as a result of a long distance call he made to me?

A. Yes.

Q. And did I tell you that I thought he would?

A. Yes.

Q. Now while there, did you assign anybody to go to Davenport and pick up Mr. Williams?

A. Yes.

Q. Who did you assign?

A. Leaming was one of them. I think he picked the other man.

Q. I see. Was that Nelson?

A. I think so, yes.

Q. Now did you hear what I told Williams over the phone which you say you assume is Williams, in the presence of Leaming, relative to making any statement about this crime?

A. Well, as I recall it, Mr. McKnight, you stated to Mr. Williams that the officers would be nice to him, that they were nice people, that they weren't going to grill him or beat him around, and to come back to Des Moines with the officers and that we would talk it over in Des Moines.

Q. Did you hear me say to them, say to this party over the phone which you assumed to be Williams, that all the questioning and answers would be given when you get here?

A. Relative to that, yes.

Q. Was it your understanding when Mr. Leaming left that they were going straight to Davenport and bring this man straight back?

A. That's right.

Q. Chief, did that happen, did they come straight back?

A. Well, they came back to Des Moines. I understand they—In fact, they did make [sic] some stops.

Q. And you were there waiting for them to come back along with me, weren't you?

A. Yes. [S.T. pp. 3, 4, 5].

Q. Now were you advised, prior to the arrival of Mr. Leaming and the defendant, that the defendant had been carried to discover the body?

A. Yes.

Q. When did you get that information?

A. I made an inquiry a couple times through the radio, as much as I could. They couldn't receive us entirely on the radio, but we kept them fairly well pin pointed on the way back. We knew they had stopped twice on the way back, and then the last time they stopped we were in radio contact.

Q. You didn't reveal that to me, though, did you, as police work?

A. No. I don't think I kept it from you.

Q. I see. But obviously you didn't tell me, and I'm not saying that it was your obligation, but you didn't tell me, did you, that they had stopped?

A. Not that I recall. I don't know if I did or didn't.

Q. Now do you recall having talked with me and I said I bet you they're questioning this fellow Williams and going to stop on the way somewhere to try to discover the body; do you remember that?

A. I remember you were quite upset about it.

Q. And do you recall what you said?

A. Not exactly.

Q. Well, let me ask you this, do you remember?

A. No, not exactly.

Q. I'm going to give you and ask you if you remember saying this: I hope they don't because we agreed that we would come straight back?

A. I may have said that, I don't know. [S.T. pp. 6, 7].

Q. Who did you get your information from about the body?

A. Well, it was radioed to me, radioed to the station, I believe to Knox, Knox said that they had stopped to find the body or some such thing as this.

Q. Now, who would have radioed?

A. Probably Leaming.

Q. Who?

A. Leaming, probably.

Q. Do you know, Chief, who called the coroner?

A. I don't know. I would assume again this may have been Leaming. He was in charge of the scene.

Q. And then Dr. Luka wouldn't have been out there unless somebody called him and knew about the facts, right?

A. I'm sure of that.

Q. Now there was no conversation—Were you present actually when the defendant was brought into the police station?

A. Yes.

Q. Was there any information given to any of you by the defendant when he has assistance of counsel here in Des Moines?

A. No. [S. T. pp. 8, 9].

. . .

Q. So actually you all, you were unable, so far as locating the body, without the assistance of Williams?

A. That's right. [S. T. p. 9].

. . .

CROSS-EXAMINATION

BY MR. HANRAHAN:

Q. Chief Nichols, on December 26, 1968, did you have any agreement with Mr. McKnight that there would be no conversation between the defendant and your detectives on the way back from Davenport?

A. There was no specific agreement made as far as a hard and fast agreement, you will not ask him anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, "We will talk when you get here."

Q. Did you hear Mr. McKnight in that telephone conversation make a statement such as this: "You're going to have to tell the officers everything," or "You're going to have to tell the officers where she is," or something of that nature?

A. Something of that nature.

Mr. Hanrahan: I believe that's all, Chief.

REDIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Anything I said about what I'd tell the officers, I did not say to him, "When you get here where I am."

A. Well, I don't know what we're trying to say except that I took what was being said over the telephone as more or less cooperative spirit as far as you were concerned as to what you were going to do with your client once he got here.

Q. And you also definitely understood that I had expected that there would be no statement made by him till he did get here in Des Moines?

A. I assume that when we were talking there at least that what you said over the telephone to this man and what you asked him to do, that that's exactly what he was going to do, and I also assumed that he had probably been fortified with some advice on the other end as to what to do when he got here. [S.T. pp. 10, 11].

. . .

JOHN D. ACKERMAN, SR.,

Called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

. . .

Q. Where do you live, Mr. Ackerman?

A. Davenport, Iowa.

Q. What is your business or occupation?

A. Lieutenant of detectives, Davenport, Iowa, police department.

Q. Were you on duty on December 26, 1968?

A. Yes, sir, I was.

Q. Did you have an occasion to see Mr. Williams here?

A. Yes, sir, I did.

Q. Do you recall about the time of day you saw him on December 26th?

A. 8:40, I believe, if I'm correct. I didn't bring in my reports. I have them with me.

Q. Well, in that vicinity?

A. Yes, sir, 8:40 a.m.

Q. Do you recall what Williams said when he came in?

A. To me?

Q. Yes.

A. I was called by the desk sergeant, called out to the front desk, a man wanted to see detectives. I went out and introduced myself and asked the man who he was. He said, "I am Anthony Williams. I am the man the Des Moines police are looking for."

Q. Then what did you say?

A. We then asked him to come back to the detective bureau. We brought him back to my office where he was advised that a warrant was on file from Polk County, charging him with the crime of child stealing. He was placed under arrest at that time and advised of his constitutional rights.

Q. Then what did you do with him?

A. After we booked him in, he was placed in a cell. Of course then we notified Des Moines and—

Q. Did you make the call to Des Moines?

A. Yes, sir, I did.

Q. Do you know whether or not Williams was permitted to talk to Henry T. McKnight?

A. Yes, sir, he was. I was present in the office.

Q. When you called to Des Moines, did you make any statement relative to whether or not Williams would talk, what did you say about that?

A. If I remember right, I believe I said that he didn't wish to say anything because — until he talked to his attorney in Des Moines.

Q. Now did you also see any other attorney there in Des Moines who visited with the defendant?

A. You mean Des Moines, Mr. McKnight, or Davenport?

Q. In Davenport.

A. Later on. Later on.

Q. About what time of day was that?

A. That would have probably been about quarter to 11, somewhere in that area, when we took Williams in before the Judge.

Q. Was that an arraignment?

A. Arraignment as a fugitive to be held on the warrant, yes sir.

Q. And did the defendant talk to the Judge?

A. Yes, sir, he did. He requested a conference with the Judge and the Judge took him into his private chambers and talked to him.

Q. You wasn't in there?

A. No, sir, I was not.

Q. Now when the defendant came out of the conference with the Judge, do you recall what took place?

A. Well, went back into the court room and the Judge of course heard the evidence in reference to the warrant on file, and he ordered him held as a fugitive for Polk County authorities, and this is when — As we were leaving the court room, is when Williams spotted Mr. Kelly sitting in the court room.

Q. Is Mr. Kelly a colored lawyer?

A. A colored attorney in Davenport.

Q. Did the defendant say anything about he wanted to retain Mr. Kelly?

A. He said to me, "Is that man an attorney?" And I advised him yes, he was, and his name was Thomas Kelly. I asked him if he wanted to talk to him, he said yes, he would like to. I then turned to Mr. Kelly and asked him if he would follow us back to the detective bureau as this man would like to confer with him, which he did. They were allowed to use the detective bureau conference room and they spent some time together.

Q. Now do you recall after you made the call to Des Moines, did Detective Leaming show up there?

A. Yes, sir, about right shortly before noon, about ten minutes to 12.

Q. Now after you said Mr. Williams didn't want to talk till he got his lawyer in Des Moines, you all made no effort to question him?

A. No, sir.

Q. So he said nothing to you all?

A. Right. Right [S.T. pp. 12, 13, 14, 15].

* * *

Q. All right. Now when they left, Lieutenant, was it your understanding that Mr. Leaming was going to take the defendant straight to Des Moines to his lawyer?

A. Yes, sir, that was my understanding.

Q. Now there was only two officers, that was Leaming and someone else; is that right?

A. Yes, sir.

Q. And when they left, Mr. Kelly stayed there in Davenport?

A. Right.

Mr. McKnight: That is all.

CROSS-EXAMINATION

By MR. HANRAHAN:

Q. Lieutenant Ackerman, are you acquainted with this Thomas Kelly?

A. Yes, sir, I am.

Q. And is he a practicing attorney in Davenport, Iowa?

A. He is, yes, sir [S.T. pp. 16, 17].

* * *

Q. Now you stated Mr. Williams came into the station approximately 8:40?

A. Right.

Q. And he was taken before the Judge at 10:45, about two hours later?

A. Right.

Q. Where was he during those two hours?

A. In the cell block, in the police station.

Q. Was he by himself?

A. Yes, sir, he was by himself.

Q. Was there any questioning of him during this period?

A. No, sir [S. T. p. 19].

* * *

Q. Now was there a time after lunch prior to the officers leaving with Mr. Williams that Mr. Williams requested another conference with Mr. Kelly?

A. Yes. He had talked to him just very shortly before their meeting of Captain Leaming and Mr. Kelly and Mr. Williams, just a few minutes in the office before the other — Where Captain Leaming went in.

Q. When Mr. Kelly and Mr. Williams were alone?

A. Right [S. T. p. 20].

* * *

Q. Do you recall what the road conditions were on December 26?

A. Very bad.

Q. Was it raining?

A. Rain and sleeting and turned cold and windy, freezing. The roads were slick.

Mr. Hanrahan: That's all [S. T. p. 21].

REDIRECT EXAMINATION

By MR. McKNIGHT:

* * *

Q. Now did you hear Mr. Kelly make any statement to the defendant relative to what he was to do on the way or was he to remain silent till he got to Des Moines; did you hear him make any statement?

A. No, I didn't hear that, sir, no [S. T. p. 22].

* * *

ANTHONY ERTHELL WILLIAMS,

Defendant, called as a witness in his own behalf, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

By MR. McKNIGHT:

* * *

Q. Now let me ask you this: On December the 26th, do you recall whether or not you called me?

A. Yes.

Q. Do you recall going in the city jail at Davenport?

A. Yes.

Q. Did you see Mr. Kelly?

A. Yes, I did.

Q. Did you retain him as a lawyer?

A. I did not retain him as a lawyer. I retained his presence only because he was the only Negro present.

Q. Now were you permitted to talk to me, Henry T. McKnight, from Davenport?

A. Yes.

Q. That was on long distance telephone call?

A. Right.

Q. Do you recall what I said relative to what you were to do when the officer picked you up?

A. Yes.

Q. What was the conversation?

A. To refuse to answer any questions until I came back to Des Moines, I was in your presence.

Q. Did Mr. Kelly, in the presence of you, say anything to Mr. Leaming about that before you left?

A. Did he say what now?

Q. Say anything to Mr. Leaming about your talking?

A. Yes, he did. He told them that I wouldn't answer any questions until I got back to Des Moines.

Q. Now what did Mr. Leaming say to that?

A. He didn't have any comment. In fact, he didn't care too much for Mr. Kelly's presence at all.

Q. Now when you all left for Davenport, what was the first thing Mr. Leaming said to you?

A. They were talking about the weather, conditions of the road and so on.

Q. Did Mr. Leaming question you in any form relative to the whereabouts of the body?

A. He questioned me periodically concerning where the body was, that he knew the girl was dead and he also mentioned that

they had some speculation that the body was near Mitchellville.

Q. Okay.

A. I mean, this wasn't in rapid succession. This was as we travelled a few miles at a time.

Q. Now did you all come straight back to Des Moines?

A. We did not.

Q. Now was there anything said about your lawyer's health in Des Moines?

A. Yes; that he had talked to you and — In fact, when he left you, you weren't feeling too well, that your heart was bothering you and that I was supposed to show them where the body was, and there would be a waste of time to go all the way to Des Moines to get you and come back, and that's what we would have to do, probably be on the road all hours of the night, and this would be bad for your health.

Q. Okay. Now did this continue until you showed them where you thought the body was?

A. Yes.

Q. Was it your understanding, when you left Davenport, that you would not be questioned until you got to Des Moines?

A. Definitely.

Q. Now these questions that were put to you out there in the car, it's obvious you had no assistance of a lawyer?

A. There was no attorney present.

Q. Do you recall approximately what time you got into Des Moines that night?

A. I was thinking it was close to 7 or 7:30.

Q. Was Lieutenant Ackerman right, do you think it was somewhere around 1:00 when you left, one, p.m.?

A. Not having a watch, I would say it might have been around 1 or 1:30, at least.

Mr. McKnight: You may cross-examine.

CROSS-EXAMINATION

BY MR. HANRAHAN:

Q. Mr. Williams, on December 26th, after you were brought back to Des Moines, you went to Captain Leaming's office immediately; isn't that right?

A. Right.

Q. And Mr. McKnight was there?

A. Right.

Q. Later on you were taken back and booked in the jail?

A. Right.

Q. Did you send for Captain Leaming later on that evening?

A. Yes, I did.

Q. Did you have some conversation with Captain Leaming?

A. Yes. I wanted a phone call.

Q. Pardon?

A. I requested that he allow me to make a phone call.

Q. What was the rest of the conversation?

A. We discussed the activities in his office.

Q. What did you tell Captain Leaming?

A. Well, I couldn't quote it word for word, verbatim, but we discussed what went on in the office, and I gave him my opinion and he gave me his. That's as far as I would like to go on that question.

Q. You didn't discuss the case itself in that conversation?

A. No, there was no questions about the case.

Q. Mr. Williams, while you were in Davenport, were you advised of your constitutional rights?

A. Yes.

Q. Were you first advised of them by Lieutenant Ackerman?

A. Right.

Q. Did he make those clear to you?

A. Yes, he did.

Q. You didn't have any trouble understanding what he was trying to tell you?

A. No.

Q. And do you recall being taken before Judge Metcalf?

A. Yes.

Q. And did Judge Metcalf also advise you of those constitutional rights?

A. Yes.

Q. He made them quite clear to you, did he not?

A. Yes.

Q. And did you request a private audience with the Judge?

A. I did.

Q. And did the Judge grant you that?

A. Yes, he did.

Q. And then as you were leaving the court room, did you see attorney Kelly?

A. I saw Mr. Kelly, yes.

Q. Did you know Mr. Kelly prior to that time?

A. I did not.

Q. So you were advised he was an attorney?

A. Yes.

Q. And did you ask to speak to him?

A. In fact, I asked was he an attorney, and then I asked to speak to him, yes.

Q. I beg your pardon?

A. I asked if he was an attorney. I couldn't think of anything else he could be.

Q. And you were told he was?

A. Yes.

Q. And did you ask to visit with Mr. Kelly?

A. I did.

Q. Did Lieutenant Ackerman let you?

A. Yes.

Q. In private?

A. Yes.

Q. After Captain Leaming arrived in Davenport, that was after lunch you met him; is that right?

A. Yes.

Q. Did Captain Leaming advise you of your constitutional rights?

A. This I don't recall, because I can't see any necessity for him to advise me of my rights.

Q. You had been advised before?

A. Yes.

Q. Do you recall the weather when you were driving back to Des Moines?

A. You mean when they were driving back—yes.

Q. When you were coming back?

A. Yes.

Q. What was it like?

A. It was getting blizzardy. It was snowing and ice mixed. The roads were ice, getting slippery and so forth.

Q. Now in Davenport did you confer with Mr. Kelly on more than one occasion?

A. Yes, I did.

Q. I'm not going to ask you what that conversation was, but I assume you conferred with him about your problem?

A. Yes, I did.

Mr. Hanrahan: I believe that's all.

REDIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Were you advised by Mr. Kelly that you were to do your talking when you got to your lawyer in Des Moines?

A. Yes.

Q. Do you recall how many stops you all made on your way back to Des Moines?

A. Three. Wait a minute, we made four, because they stopped to get some gas prior to leaving Davenport.

Q. Were you questioned by Mr. Leaming of whether or not you got some gas at a filling station?

A. Yes.

Q. Were you taken by there?

A. Yes.

Q. Were you taken by a rest area near Grinnell?

A. Yes.

Q. Now did I understand you to say that Captain Leaming said to you that they had knowledge or good reason to believe that the body was in Mitchellville?

A. Yes, he did make that statement. This was in the car on the way back to Des Moines.

Q. Had you at anytime before then said anything to them about anything like that?

A. I did not.

Q. Then were you carried to the area near Mitchellville?

A. Right.

Q. Was it off of the interstate?

A. Yes. In fact, to be specific, that statement was made at least twice, once after we had drank coffee at a rest area—not the rest area, the filling station. He said, "You might as well tell us where the body is, we have an idea it's near Mitchellville, and when we get back to Des Moines your attorney and you will accompany us back here and show us where the body is."

Mr. McKnight: That's all.

Mr. Hanrahan: Nothing further.

The Court: You may step down [S. T. pp. 23-31].

. . .

CLEATUS M. LEAMING,

Called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

. . .

Q. And what is your occupation, Mr. Leaming?

A. Captain, police, City of Des Moines.

Q. And are you the chief of detectives in the Des Moines Police Department?

A. Yes, sir.

Q. And were you such on December 26, 1968?

A. Yes, sir.

Q. On that date had you been investigating and working on the matter of this missing ten year old girl, the Powers girl?

A. Yes, sir.

Q. And at that time she had been missing for two days; is that correct?

A. Yes.

Q. On December 26, 1968, did Mr. McKnight come to your office?

A. Yes, sir.

Q. Approximately what time, Captain?

A. 8:30, 8:45, a. m., in that area.

Q. And while he was there, did you receive a call from the Davenport Police Department?

A. Yes, sir.

Q. And did they inform you that Anthony Williams was in the Davenport Police Department?

A. Yes, sir.

Q. And did Mr. McKnight get on the telephone and have some conversation with Mr. Williams?

A. Yes, sir.

Q. Did you hear Mr. McKnight's end of that conversation?

A. Yes, sir.

Q. And after that conversation, were you to go to Davenport to get Mr. Williams?

A. Yes, sir.

Q. Prior to your going, did you have some conversation with Mr. McKnight?

A. Yes, sir.

Q. Was there any agreement between you and Mr. McKnight that you would not have conversation with Mr. Williams on the way back to Des Moines?

A. No, sir.

Q. Did he instruct or request you in any way not to interrogate or have conversation with Mr. Williams?

A. No, sir.

Q. What time did you leave Des Moines for Davenport?

A. Approximately 9:30, a. m.

Q. And who went with you?

A. Detective Nelson.

Q. And did you go straight to Davenport?

A. Yes, sir.

Q. What time did you arrive in Davenport?

A. Ten minutes till 12, noon [S. T. pp. 32, 33, 34].

* * *

Q. Did you have some conversation with Mr. Williams.

A. Yes, sir.

Q. What was that conversation at that time?

A. I advised him of his rights under Miranda and in addition to advising him of his rights, I told him that we both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and that I want you to remember this because we'll be visiting between here and Des Moines.

Q. Was Mr. Kelly present during this time?

A. Yes, sir [S. T. pp. 35, 36].

* * *

Q. Did Mr. Kelly go from the station to the car with you and Mr. Williams?

A. Yes, sir.

Q. Who drove the car back from Davenport?

A. Detective Nelson.

Q. And where were you and Mr. Williams in the car?

A. In the rear seat.

Q. Did Mr. Kelly ask you to ride back to Des Moines with you?

A. No, sir.

Q. Did Mr. Williams ask to have Mr. Kelly ride back to Des Moines?

A. No, sir.

Q. About what time was it when you left Davenport?

A. Two, p. m.

Q. Did you stop for gas in Davenport?

A. Yes, sir.

Q. Describe the weather at that time.

A. It was raining and sleeting and freezing as it—highway was becoming icy, and it was foggy to some extent.

Q. Did you have any conversation with Mr. Williams after you left Davenport?

A. Yes, sir.

Q. Did you interrogate Mr. Williams between Davenport and Des Moines?

A. No, sir.

Q. What was the nature of this conversation you were having with Mr. Williams?

A. Well, Mr. Williams was—

* * *

Mr. Williams was asking me a great deal of questions as to had I talked to different people who were acquaintances of his. What was their opinion of him. Had I in fact gone to their house and searched their houses or had I just talked to them and this sort of thing. We had quite a discussion relative to religion, he telling me about his interests in youth groups and we had conversation about him playing a piano and organ, singing, this sort of thing.

Q. You had quite a bit of conversation other than the particular case you were working on at that time?

A. A great deal of conversation not related to the case and some conversation related to the case.

Q. Who brought up the conversation regarding the missing Powers girl?

A. Mr. Williams.

Q. Did he tell you some things relative to the missing Powers child?

A. Yes, sir.

Q. And was this a result of your questioning or interrogating him?

A. No, sir.

Q. Did he ask you questions about the missing Powers child?

A. Yes, sir.

Q. Now as a result of his questions and his statements about the missing Powers child, did you obtain considerable knowledge about her and eventually find her body?

A. Yes, sir.

Q. That was on the way back from Davenport?

A. Yes, sir.

Q. And this knowledge and finding her body, those things are matters you testified to before the grand jury in this case; is that correct?

A. Yes, sir.

Q. And this is information which you passed on to the other officers involved in the case?

A. Yes, sir.

Q. Did Detective Nelson at any time interrogate the defendant on the way back from Davenport?

A. No, sir.

Q. Were any threats of any nature made upon Mr. Williams on the way back from Davenport, either by yourself or Mr. Nelson?

A. No, sir.

Q. Did Mr. Williams at any time say or indicate that he did not wish to talk to you on the way back from Davenport?

A. No, sir.

Q. Did he at any time say he wanted to have an attorney present before he talked to you?

A. Not in that particular manner, no, sir.

Q. Well, tell us in what manner, Captain.

A. He told me on several times, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." That would be the closest he would have come to it.

Q. Did you at any time tell Mr. Williams that Mr. McKnight told you to tell Williams that he was to tell you the whole story on the way back from Davenport?

A. No, sir.

Q. You stopped at a gasoline station on the way back from Davenport; is that correct?

A. Yes, sir.

Q. And how did that come about?

A. We stopped at two of them: The first one we stopped at was in the west edge of Davenport, and we stopped to get gasoline; the second one was a Skelly station on the north side of the freeway, and as we were driving along Mr. Williams said to me, "Did you ever find a girl's shoes?" And I said, "I don't know. There is a bunch of clothing that's been found in a trash receptacle, but they were found by BCI agents and highway patrol agents and so forth and I haven't had a chance to look them over and I don't know what they did find." I said, "However, if they were in the same receptacle with those other clothing, we would have them." And Mr. Williams said no, they weren't in there with the others, that he had taken them over to this Skelly station where there is a little restaurant attached to that he had stopped at their station and bought \$2.00 worth of gasoline, that he had gone on around behind the station and put these shoes in an empty cardboard box which was sitting around behind the restaurant.

He described them as not really go-go-boots, but that they were high brown leather boot. [sic] That's the reason we stopped there.

Q. Did he point that station out to you?

A. He did, yes, sir.

Q. Did he do this voluntarily, on his own, or did you ask him to point it out?

A. No. He said that station—He nodded his head, that station right over there as we were coming along the freeway and at that time you could see it up there.

Q. And that's where you made a stop?

A. Yes, sir. Detective Nelson turned off and went up to that station and we in fact drove around behind it.

Q. Did you make another stop at a rest area on the way back?

A. Yes, sir.

Q. How did that come about?

A. Well, after we looked for those boots and we didn't find them, then we got back onto the freeway, Mr. Williams said, "Did you find the blanket?" And I said, "I don't know, if the blanket was with those same clothing." He said no, they were in the same room, but that they were over by the toilet area or something of this nature. So by this time we were just about to that rest area. However, we had to cross the freeway to get over to that side, so we went on and crossed over and came back and pulled up and stopped, and there were BCI agents in a car behind us. They came on up there and I told them we were looking for a blanket, and they said was there more than one blanket, and I said, "Well, I don't think so." And they said, "Well, that blanket has been recovered. We do have it." So at this point we continued on.

Q. Now these stops were not a result of your asking Mr. Williams any questions; is that correct?

A. No, sir.

Q. Was he talking all the way back?

A. We were both talking. He was talking a great deal, and I was talking to him a great deal, yes, sir.

Q. In your conversation with Mr. Kelly at Davenport, did he request or instruct you not to talk to Mr. Williams on the way back?

A. No, sir.

Mr. Hanrahan: That's all.

CROSS-EXAMINATION

BY MR. McKNIGHT:

Q. Officer, how long have you been on the police department?

A. 19 years and two months.

Q. Do you want us to believe that you didn't ask this defendant any questions, he just started talking?

A. No. I asked him a great many questions, but not pertaining to this case.

Q. And you know that the defendant had said that he would tell you the story when he got back to Henry T. McKnight?

A. Yes, he did, several times.

Q. But you kept getting what you could get before you got to Henry T. McKnight, didn't you?

A. We were talking, Mr. McKnight.

Q. Just answer the questions—

A. But not asking questions.

Q. But you kept getting what you could get before you got to Henry T. McKnight?

A. This is true, yes, sir.

Q. And you didn't have the least idea of where the body was, did you?

A. Yes, I did.

Q. Who did you get that from?

A. Theory.

Q. Just your theory?

A. That's right, yes, sir.

Q. And you did say to him, "I theorize that the body is at Mitchellville?"

A. I did, yes, sir, and I was right.

Q. Did you tell him I was having heart trouble?

A. No, sir.

Q. You didn't say that to him?

A. No, sir.

Q. You didn't say to him that your lawyer's sick and he had to go home and go to bed?

A. No, sir.

Q. You didn't even say that?

A. No, sir. Had some conversation along this line with Mr. Kelly.

Q. And now you deny that Mr. Kelly said that Mr. Williams will be questioned when he gets into Des Moines with his lawyer McKnight?

A. I do deny that, yes, sir [S. T. pp. 36-44].

. . .

Q. And that conversation, even though Williams had told you several times that he would tell everything he had to tell when he got to me, you kept talking till you got that information?

A. That's not quite the way he said it, Mr. McKnight. He said, "I will tell you the whole story after I see McKnight."

Q. Now obviously there was no lawyer there to assist him about what he told you?

A. In the car?

Q. Yes.

A. No, sir [S. T. p 45].

. . .

Q. Now how many stops did you make?

A. Well, I got to count. I stopped at the gas station in Davenport to gas up. I stopped at the Skelly station north of the freeway where Williams said he put Pamela Powers' boots.

Q. Just a minute. You want to tell us just out of the clear sky that Mr. Williams said to you, "I put the boots over there," and you hadn't asked him anything?

A. No, he didn't say that. He said, "Have you found the boots."

Q. What did you say?

A. I said I don't think so. I said, "Really, I don't know, because the clothing and articles that were found, I haven't had an opportunity to look at. Now if they were with the other clothing, we have them," and he said no, they weren't. "I put them over here at this Skelly station."

Q. He just volunteered that?

A. Yes, sir.

Q. Where else did you stop?

A. After we stopped at the Skelly station, we stopped very briefly at the Grinnell turn off rest area where the other articles of clothing were found to look for the blanket.

Q. Just a moment right there. You want to tell us you didn't ask him anything about the blanket?

A. No. I thought the blanket had been found. When we got back to the freeway, he said, "Did you find the blanket?" Again I said, "Was it with the other stuff?" He says no, it was in the same room, but it was over by the stools or something, so this is why we stopped there [S. T. pp. 46, 47].

Q. You didn't ask Williams any questions?

A. I beg your pardon?

Q. You didn't ask Williams any questions?

A. No, sir, I told him some things.

Q. You told him some things?

A. Yes, sir. Would you like to hear it?

Q. Yes.

A. All right. I said to Mr. Williams, I said, "Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when we're driving down the road." I said, "I want you to observe the weather. It's raining and it's sleeting and it's freezing. Visibility is very poor. They are predicting snow for tonight. I think that we're going to be going right past where that body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it. Now I just want you to think about that when we're driving down the road." That's all I said.

Q. About where were you when you said that?

A. Well, not very far out of Davenport. This is on the freeway.

Q. And now when you got to Mitchellville, did you ask him had he thought about it?

A. No. As we were coming towards Mitchellville, we'd still be east of Mitchellville a ways, he said to me, "How do you know that would be at Mitchellville?" And I said, "Well, I'm an investigator. This is my job, and I just figured it out." I said, "I don't know exactly where, but I do know it's somewhere in that area." He said, "You're right, and I'm going to show you where it is."

Q. He just voluntarily said, "You're right?"

A. That is correct, yes, sir.

Q. You didn't question him at all, didn't ask him any questions?

A. Beg your pardon?

Q. You didn't ask him any questions?

A. No. I told him [S. T. pp. 47-49].

* * *

Q. How many times did you say to him you wanted him to just think it over?

A. One time as near as I can remember.

Q. Did you hear me say in your office before you left, "Mr. Williams, you make no statement till you get to me."

A. No, sir.

Q. You didn't hear that?

A. No, sir. I didn't hear that.

Q. So you didn't hear me even talk to him, did you?

A. Yes, I did. I heard you talk to somebody.

Q. Did you say to me, "We are going to Davenport and bring Mr. Williams straight back to Des Moines and you all wait here."

A. No, sir, not just like that.

Q. Not just like that. What do you mean, not like that?

A. Well, that wasn't the conversation, Mr. McKnight.

Q. Now obviously, officer, you had some conversation with me about that any conversation with Mr. Williams would be taken when you got back in your office; don't you remember that?

A. We had some similar conversation of that, but not just like that, no.

Q. Even after you got back you said to me, "We're going to sit down and have coffee and we're going to have the conversation." Isn't that what you said?

A. I asked you to have a cup of coffee.

Q. Wait a minute, officer, don't you mean to say that you didn't say to me that we wanted to have this conversation?

A. It's possible I said that because I was looking forward to one.

Q. Yes. Well, how come you're looking forward to one if you didn't know you were going to have one before you left?

A. We did have conversation along those lines, but not just in a manner in which you're putting it.

Q. Along those lines. So you was expecting me to sit down when he got back, when he had assistance of counsel, you knew

that, didn't you?

A. Yes. He even told me that.

Q. He even told you?

A. Right.

Q. All right, then. So there was some understanding before you even left here that the conversation would take place here in Des Moines?

A. Some would, yes [S. T. pp. 50, 51].

• • •
REDIRECT EXAMINATION

By MR. HANRAHAN:

Q. Captain Leaming, prior to the defendant showing you where the body was, had you told him you thought it was in the Mitchellville area.

A. Yes, sir.

Q. And would you tell us how you arrived at this belief you had?

A. Well, they had found the clothing in the Grinnell area. They had searched the entire Grinnell area and the Newton area and they hadn't found anything. They found this clothing. I felt that she probably was nude or nearly nude. In my thinking, I figured that he had probably got rid of the body as soon as he possibly could after he left Des Moines. I felt that it wasn't in the Grinnell area, it wasn't in the Newton area. So I then thought probably as quick as he could get out of Des Moines he would dispose of the body. I first thought of Altoona and I had thought, no, when you're on a freeway, this feels like you're still in Des Moines when you hit that, so I thought of Colfax. And I thought no, their search around Newton probably extended as far as Colfax, so I figured Mitchellville.

Q. Now he told you when he got back to Des Moines with Mr. McKnight he would tell you the whole story; when did he make that statement?

A. Well, he told me this not too long after we got on the freeway, after we had gassed up and started — gotten on the

freeway and started towards Des Moines. He told me that the first time.

Q. Now what about this car that was following you, who was in that car?

A. State agents.

Q. And what is the purpose of this car following you?

A. It was agreed before we left Davenport Police Department that the state agents would follow me into Des Moines in the event that we would run off the road or slide off the road, they had a radio in their car, they had contact with the state radio and the highway patrol and so forth, which I didn't have. Also, if we would go off the road or anything, they could take me and the prisoner and continue on into Des Moines. This is the reason.

Q. Did you explain this to Mr. Williams?

A. I did, yes, sir.

Q. And did he express any fear for this car that was following you?

A. No. He asked me who they were and what they were there for, and I explained this to him and added that, "These are policemen, they're here for your protection. They have radio communication and so forth which I don't have in this squad car. I only have the state radio."

Q. And your radio was worthless out that far from Des Moines?

A. Yes. You can't get anybody when you're out a certain distance out of Des Moines, why, you can't get Des Moines or highway patrol or anybody with our radio.

Q. This other car had a statewide radio; is that correct?

A. Yes, sir [S. T. pp. 52-54].

. . .

The following excerpts of testimony are taken from the transcript of the trial held April 30, 1969, in Polk County District Court, before the Honorable J. P. Denato, Judge.

DANNY CUPPLES,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

. . .

Q. What is your occupation, Mr. Cupples?

A. Me and my brother run a truck stop off the interstate.

Q. And where is it located?

A. On Interstate 80 at Grinnell [T. T. p. 115].³

. . .

Q. Were you working at the truck stop on December 24th, 1968?

A. Yes.

Q. What hours did you work that day?

A. About ten in the morning, around midnight.

Q. Now do you see a man in this courtroom now known to you as Robert Williams or Anthony Erthell Williams?

A. That's him sitting right there.

Q. Would you point to him again, please.

A. Right there.

MR. HANRAHAN: Let the record show the witness has pointed to the defendant.

Q. Did you see him on December 24th, 1968?

A. Yes.

Q. You will have to speak up.

A. Yes.

³ The abbreviation T. T. shall stand for Trial Transcript.

Q. Where did you see him?

A. Well, he pulled up to get some gas [T. T. pp. 116, 117].

* * *

Q. Then did you see him after that?

A. I seen him when the detectives brought him back.

Q. When was that?

A. That was a couple days after that.

Q. Couple days after that?

A. (Witness nods head.)

Q. Was he in custody of two detectives then?

A. Yes.

Q. Do you know who they were?

A. The detectives? That was the first time I seen them, that was the only time I have seen them.

Q. Did they stop at the service station on that day?

A. Yeah, they pulled around in back.

Q. Were you back there?

A. Well, no they come up and got me.

Q. And then did you go back there?

A. Yeah.

Q. Did you see Williams at that time?

A. Yeah.

Q. What was he doing?

A. He was sitting—

* * *

A. He was sitting in the back seat.

Q. Of—go ahead.

A. Of the detectives' car, you know, both the detectives were outside the car. He was sitting in the back seat [T. T. pp. 119, 120].

* * *

(Thereupon, the following record was made in chambers out of the presence and hearing of the jury:) [T. T. p. 121].

* * *

ANTHONY ERTHELL WILLIAMS,

called as a witness in his own behalf, being first duly sworn by the Court testified as follows:

EXAMINATION

BY MR. McKNIGHT:

Q. Mr. Williams, how old are you?

A. Twenty-five.

Q. When did you come to Des Moines?

A. On or about July the 6th.

Q. 19 what?

A. '68.

Q. And where had you been living just before you came to Des Moines?

A. Fulton State Hospital.

Q. Is that a mental hospital?

A. Yes.

Q. How long were you there?

A. Approximately three years.

Q. Were you discharged?

A. No.

Q. Did you escape?

A. Yes, in a manner of speaking.

Q. Now when you were in Rock Island, Illinois, on or about the 26th of December, did you have a conversation with Henry T. McKnight?

A. Yes.

Q. Did you agree to surrender?

A. Yes.

Q. Did you surrender?

A. Yes.

Q. Where did you surrender?

A. Davenport, Iowa.

Q. Was there a conversation between Henry T. McKnight and you after you surrendered to the Davenport police?

A. Yes.

Q. What was the final instructions that you got from Henry T. McKnight?

A. Not to talk to any of them until I returned to Des Moines.

Q. Did you say you would do that?

A. Yes.

Q. Did you see a Mr. Kelly there?

A. Yes.

Q. Was this Kelly a lawyer?

A. Yes.

Q. Did you hire Mr. Kelly?

A. No.

Q. Let me ask you this: Did Mr. Kelly have any conversation with Mr. Leaming in your presence just before you left Davenport?

A. Yes.

Q. Do you remember what he said to them?

A. Something to the effect of he's not to say anything until he gets back to Des Moines, or he won't do any talking until he returns to Des Moines.

Q. All right. Now after you got in the car on the way back to Des Moines, where were you seated?

A. In the back seat.

Q. Who was back there with you?

A. Leaming.

Q. What if anything did Leaming say to you?

A. He said a number of things, centering around, that you were ill and that you had—something that happened to your heart during the day, and that they knew the body was near Mitchellville, and also that I best—it would be better to show it to them now because you wouldn't want to come back and that you had already instructed them as soon as I got to Des Moines that we would come back and show them where the body was.

Q. And did he say anything further about this matter relative to the weather conditions?

A. That the streets were slippery and it was blizzardy and it would be late in the night getting back, or it might even lead to the early hours of the morning.

Q. Did you, after hearing that, finally agree to show him what you knew about the body?

A. Yes.

Q. Is that the reason you agreed to it, as a result of what he said?

A. Exactly.

Q. You didn't know whether I had had a heart attack or not, did you?

A. No [T. T. pp. 123-126].

• • •

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

DANNY CUPPLES

DIRECT EXAMINATION (continued)

BY MR. HANRAHAN:

* * *

Q. And then I asked you if you and Mr. Williams had any conversation.

A. Yeah.

Q. And what was that conversation?

* * *

A. He said to me, he said, "You are the one that sold me my gas, aren't you?" And I said, "Yeah."

Q. Was that the extent of the conversation between you and Williams?

A. Yeah, between me and him.

Q. Did you hear any conversation between Williams and the two detectives that were with him?

A. Yes.

Q. And what was that conversation?

* * *

A. There was two detectives there, and one of them said to Williams, he said, "Now where did you put the boots at?" And he said, he pointed there behind the building and he said, "In a container over there." [T. T. pp. 127, 128].

* * *

JOHN D. ACKERMAN, SR.,

called as a witness on behalf of the plaintiff, being first duly sworn by the court, testified as follows:

CROSS-EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Now didn't you yourself want to question this defendant?

A. Yes, sir, I did.

Q. What did he say to you?

A. I only asked him one question, where was the little girl and was she safe. I told him that we were worried about the safety and the health of the little girl, and if she was alive and if she was in the area, we would like to know so that we could get help to her.

Q. Did he tell you that you ask my lawyer anything you want to know?

A. No, sir, he did not.

Q. What did he say?

A. He said, "Don't you know."

Q. Then what did he say?

A. I says, "Know what?" And, "My lawyer knows."

Q. He said his lawyer knows?

A. His lawyer knows, and that's all that was said [T. T. p. 210].

* * *

Q. Now let's forget about this violation of the constitutional rights. Let me ask you this: Was Leaming standing present when Mr. Kelly said that the defendant will do no talking till he gets to Des Moines to McKnight?

A. No. Captain Leaming and Detective Knox had not arrived yet at this time. This is when Mr. Kelly and Williams came out of our interrogation room.

Q. I see. Now you didn't hear any conversation between Kelly, the defendant and Leaming?

A. No, sir, I did not [T. T. p. 211].

* * *

CLEATUS M. LEAMING,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

Q. (By Mr. Hanrahan) Now to boil this all down, Captain, on December 25th, 1968, while you were in Davenport, were you looking for the defendant here?

A. Yes, sir.

Q. Did you return to Davenport, Iowa, on December 26th, 1968?

A. Yes, sir.

Q. Who went with you at that time?

A. Detective Arthur Nelson.

Q. What time did you arrive in Davenport?

A. Arrived at the Davenport Police Department at ten minutes till 12.

Q. What did you do after you got there?

A. We were advised that the Anthony Williams had just been served his lunch, so we ourselves went to lunch.

Q. And after lunch, did you return to the police station?

A. Yes, sir.

Q. What time would that have been?

A. Approximately ten minutes till 1.

Q. At that time did you meet the defendant Williams here?

A. Yes, sir.

Q. Had you known him prior to that time?

A. No, sir.

Q. Who if anybody was with Williams when you met him?

A. Mr. Kelly and—

Q. Excuse me, is that Tom Kelly, a lawyer in Davenport?

A. Yes, sir. And Lieutenant Ackerman of the Davenport Police Department.

Q. Did you have any conversation with Williams when you first met him?

A. Yes, sir.

Q. What was that conversation?

A. Well, Mr. Kelly, the attorney, introduced me to Mr. Williams and advised him that I had something to tell him. At that point I asked Mr. Williams if he had been advised of his constitutional rights. He stated that he had. I advised him that I was going to advise him again, and I did advise him.

Q. At that time did you advise him of his rights?

A. Yes, sir.

Q. What did you tell him in regard to his rights?

A. I told him that he had a right to remain silent, that anything he said to me would be used against him in a court of law, that he had a right to an attorney present during any questioning, that if he could not afford an attorney the Court would appoint one for him. I further added that, however, you and I both know that you are represented by counsel here, Mr. Kelly, and you are represented by Mr. McKnight in Des Moines, and do you fully understand that. He stated yes, that he did.

I then further advised him that I wanted him to be sure to remember what I had just told him because it was a long ride back to Des Moines and he and I would be visiting.

Q. What happened after you advised him of his rights, Captain?

A. He requested to talk to his attorney Kelly alone.

Q. And did he?

A. Yes, sir.

Q. And how long did that talk last?

A. Approximately twenty minutes.

Q. And then what happened?

A. Lieutenant Ackerman and myself re-entered the room along with Detective Nelson, and prepared to place handcuffs on Mr. Williams. At this point Mr. Williams requested to talk to Attorney Kelly alone again.

Q. This was a second time?

A. Yes, sir.

Q. And was that wish granted?

A. Yes, sir.

Q. How long did he talk to him at this time?

A. Approximately ten or fifteen minutes [T. T. pp. 214-217].

. . .

Q. Then what did you do, Captain?

A. We had some conversation relative to news media, cameras and so forth.

Q. Who was this conversation with?

A. Mr. Kelly and Mr. Williams.

Q. What was that conversation?

A. Attorney Kelly stated that Mr. Williams did not wish publicity and that he would like to arrange to take him to a car in such a manner that he might possibly be able to place his briefcase in front of Mr. Williams' face to avoid some of the publicity and so forth.

Q. Where was your police car at this time?

A. Directly behind the Davenport Police Department, would be at the rear door.

Q. And did you leave the Police Department, the police station at this time?

A. Yes, sir.

Q. Did you leave by that rear door?

A. Yes, sir.

Q. Now who went from the police station to your police car?

A. Attorney Kelly, Mr. Williams, Detective Nelson and myself.

Q. Did you place Williams in the car at that time?

A. Mr. Kelly placed him in the rear seat.

Q. Did you get into the car?

A. Yes, sir.

Q. Which seat?

A. Rear seat.

Q. And Detective Nelson?

A. Yes, sir, he got behind the wheel.

Q. He was driving the car?

A. Yes, sir.

Q. Just the three of you in the car?

A. That's all.

Q. Did you leave the Davenport police station at that time?

A. Yes, sir.

Q. Where did you go from there?

A. Went to the west edge of Davenport where we stopped at a filling station and gassed up.

Q. Anybody get out of the car at that time?

A. Detective Nelson got out and paid for the gas.

Q. Did you and Williams stay in the car?

A. Yes, sir.

Q. Where did you go from there?

A. Went directly to the freeway, Interstate 80, and headed west toward Des Moines.

Q. Did you have any conversation with Williams at this time?

Mr. McKnight: Did you hear Mr. Kelly say that the defendant would make no statement till he got to Des Moines?

The Witness: No, sir.

Mr. McKnight: Did you hear Mr. Kelly say that he didn't want to talk till he got to his lawyer in Des Moines, McKnight?

The Witness: No, sir.

Mr. McKnight: Did you hear McKnight tell this defendant over the phone, when I was standing by you at approximately 9 a.m., on the 26th, he was to do no talking till he got to Des Moines?

The Witness: No, sir.

Mr. McKnight: You didn't hear that?

The Witness: No, sir.

Mr. McKnight: You were standing there, though?

The Witness: Yes, sir.

Mr. McKnight: Heard me talking?

The Witness: Yes, sir.

Mr. McKnight: But you didn't hear that?

The Witness: No, sir.

Mr. McKnight: Now the defendant had no lawyer out there with him, did he, on the highway?

The Witness: In the car?

Mr. McKnight: Yes.

The Witness: No, sir.

Mr. McKnight: You had information and you knew you had with you a patient that had escaped from a mental hospital?

The Witness: Yes, sir.

Mr. McKnight: Then you started talking to him?

The Witness: He started talking [T. T. pp. 217-221].

Mr. McKnight: All right. Now we object to this, any conversation that he had with defendant on the way from Davenport to Des Moines, for the same was in violation of the defendant's constitutional rights to have a lawyer present at every stage of the game; for the further reason, the officer knew he had a mental patient and that said statements made were not voluntarily made and the defendant could not effectively waive the right to have a lawyer.

Q. (By Mr. Hanrahan) After leaving this service station in Davenport, you went to the interstate; is that correct?

A. Yes, sir.

Q. How far was this service station from the interstate?

A. Probably a mile.

Q. Now after you left the service station, I believe you testified there was some conversation?

A. Yes, sir.

Q. Who initiated that conversation?

A. Mr. Williams.

Q. What was that conversation? [T. T. p. 221].

Mr. McKnight: Now just a moment. So that I won't have to continue to object, I'll put in the objection once unless the thing changes, I'll ask that it stand, any conversation, admissions and demonstrations or acts of the defendant from Davenport to Des Moines is objected to on the constitutional question heretofore urged.

The Court: It may stand so far as the Court is concerned. Is that agreeable?

Mr. Hanrahan: That's agreeable.

Q. (By Mr. Hanrahan) What was the first conversation you had with Williams from that point on?

A. Mr. Williams asked me if I hated him and if I wished to kill him. I told him I did not hate him, I did not wish to kill him.

As far as I was concerned, he was just another prisoner, and that this was not my attitude, and that this was probably one of the reasons that I was sent to get him, that I did have such an attitude. Also advised him that I myself had had religious training and background as a child, and that I would probably come more near praying for him than I would to abuse him or strike him. And I had no intentions of injuring him in any way, and that I felt myself to be a good police officer and I had every intention of protecting him and not abusing him or allowing anyone else to molest or abuse him in any manner while he was in my custody.

Q. Go back just a minute, Captain, there were just the three of you in the car?

A. Yes, sir.

Q. Was there another car involved?

A. Yes, sir.

Q. Tell us what that car was.

A. There was a BCI car, which is the Bureau of Criminal Investigation, State Agent Jutte was following us from Davenport all the way to Des Moines.

Q. What was the purpose of having the state car follow you?

A. Well, number one, we had very hazardous weather. It was raining and sleeting and freezing. It was very slick on the highway. We had no state police radio in our car. We had a Des Moines city vehicle with a city radio in it, which is useless out in the state. We did not have contact with even our own department. We are too far out.

Mr. Jutte, state agent, was to follow us in the event that we slid off the road or had any problems at all with our prisoner. He was there to assist us. He had a radio, had contact with the state, he could call us a tow truck or he could call for a highway patrol or he could transfer the prisoner and myself into his car and bring us on into Des Moines if the need arose.

Q. Did you have some further conversation with Mr. Williams?

A. Yes, sir.

Q. And what was that?

A. Well, Mr. Williams was very talkative, and he was asking me who we had talked to that were friends of his, if we talked to the reverend from the church, if we talked to Mr. John Searcy, if we had checked for fingerprints in his room at the YMCA, and we discussed religion. We discussed intelligence of other people. We discussed police procedures, organizing youth groups, singing, playing a piano, playing an organ, and this sort of thing.

Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

At that point Mr. Williams asked me why I should feel that we would be going right by it. I told him that I knew it was somewhere in the Mitchellville area and I didn't know exactly where, but I did know that it was somewhere in the Mitchellville area, and I felt that we should stop and look.

I stated further, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." This was not mentioned again until way on further down the road. As we approached the Grinnell turn-off proceeding west on Interstate 80, Williams said to me, "Did you find her shoes?" I said that I did not know whether the shoes had been found or not, that the BCI agents and the highway patrol had found some articles of clothing at the Grinnell rest area, turn-off rest area. But at this point I did not know what they had found.

I stated that if the shoes were with the articles in the rest area, they had been found, and if they weren't there, they hadn't been found. Williams said, "No, I didn't put them with the rest of the clothing." He at this point nodded his head north of the freeway where there was a Skelly station and said, "I put the shoes right up there, that filling station." He said, "I went up there and I bought \$2 worth of gas." He said, "There is a little restaurant right there with the oil station." He said, "I went around behind the building and dropped the shoes into an empty cardboard box."

I asked him what kind of shoes they were. He said they were brown leather. I asked him if they were go-go boots. He said no, that they weren't exactly go-go boots, but they were high boots of this type.

* * *

Q. (By Mr. Hanrahan) After this conversation, Captain, what did you do?

A. Drove to the filling station.

Q. And do you know the name of this filling station?

A. Only that it's a Skelly station.

Q. What does this station consist of?

A. Well, it's an ordinary filling station. I believe it has a grease room and it has pumps out in front of it, and that on the south of the filling station there is a restaurant.

Q. And you went to this station?

A. Yes, sir.

Q. And what did you do when you drove to the station?

A. Drove right around behind the building where the box was supposed to be.

Q. Did you get out of the car there?

A. Yes, sir [T. T. pp. 222-227].

* * *

Q. Did you search for these boots at this time?

A. Yes, sir.

Q. Did you find them?

A. No, sir.

Q. Now how long were you there at the station?

A. Probably twenty minutes.

Q. Did you do anything else other than search for the boots?

A. Yes, sir.

Q. What was that?

A. I got a cup of coffee for Mr. Williams and one for myself and one for Detective Nelson, and we drank it.

Q. Did you take the handcuffs off of him at that time?

A. Yes, sir.

Q. Was he in the car or out of the car at that time?

A. Out of the car [T. T. p. 228].

* * *

Q. Then after you drank your coffee, what did you do?

A. Detective Nelson placed the handcuffs back on Williams, again behind his back. He and I got into the back seat of the car and Detective Nelson got under the wheel and we went back to the freeway [T. T. p. 229].

* * *

Q. Did you go directly back to the interstate then?

A. Yes, sir.

Q. Proceed back toward Des Moines?

A. Yes.

Q. Did you have any conversation with Williams at this time?

A. Yes.

Q. Would you tell us what that was, please.

A. Well, just as soon as we got on the freeway and started west, he said, "Did you find the blanket." And again I said I don't know, if it was with the other clothing in a trash receptacle,

why, it was found. He said, no, he didn't put it in the trash receptacle, he put it in the same room but it was over by a toilet.

Q. What did you do then?

A. Oh, by this point we were just going past the rest area so we went to the first place we could turn around and went back to the rest area [T. T. pp. 229, 230].

. . .

Q. Did you find the blanket at that time?

A. No, sir [T. T. p. 231].

. . .

Q. So did you get back in your cars then?

A. Yes, sir.

Q. Back to the interstate?

A. Yes, sir.

Q. And did you proceed on toward Des Moines?

A. Yes, sir.

Q. I guess you would have—

A. We had to go a little bit east and another turn-around to head back toward Des Moines.

Q. Then did you have any more conversation with Williams after that?

A. Yes, sir.

Q. What was that, please?

A. Well, we had further discussions about people and religion and intelligence and friends of his, and what people's opinion was of him and so forth. And, oh, some distance still east of the Mitchellville turn-off he said, "I am going to show you where the body is." He said, "How did you know that it was by Mitchellville?" I told him that this was our job to find out such things and I just knew that it was in that area.

Mr. McKnight: I would ask counsel to proceed with question and answer, please, Your Honor.

The Court: Proceed.

Q. Did you turn off the interstate after this?

A. Yes, sir.

Q. State whether or not Williams showed you where to turn off.

A. Yes.

Q. Do you know the name of the street or the highway on which you turned off?

A. It's the Mitchellville turn-off, and when you get south a ways, it's 112th Street Northeast, but I don't know whether it is where you go under the interstate or not [T. T. pp. 231, 232].

. . .

Q. Did you observe the body of Pamela Powers at that time?

A. Yes, I did.

Q. Would you describe the body, please.

A. Well, it was a white female, appeared to be frozen, her legs were in a drawn up position, she was lying in a ditch beside of a cement culvert, kind of down in the ditch, weeds were kind of pulled over her. She had snow on her, she was laying with her head pretty much toward the north and her head was back in such a position that from the road you could not see her face. She was disrobed with exception of a small T-shirt, I would call it [T. T. p. 243].

. . .

Q. Did you get down off the road to examine or look at the body?

A. Yes, sir.

Q. Then after you went and looked at the body, what did you do?

A. I went back to the car.

Q. Was Williams in the car at that time?

A. Yes, sir, he and Detective Nelson.

Q. Williams have anything to say at that time?

A. Yes, sir.

Q. And what was that?

A. He asked me if I saw her, if I saw the body. I told him I did. And he asked me, "What did she look like?" I told him she looked like she was frozen and looked like she was dead. He asked me if I saw her face and I told him no, I didn't, and he asked me to go back and look at her face, which I did. And I returned to the car, he asked me what I observed about her face. I asked him what he meant. He said, "Well, how did she look." I said, "Well, there would appear to me to be blood around her mouth," and he said, "Yes. Did you notice any discoloration around her eyes?" I said yes, I did, quite a little. He said, "What does that tell you about the way she died?" I said, "Well, in her frozen condition, me not being a doctor, I can't tell too much about it." He said, "Well, you have had a great deal of experience in these sort of things, surely this should tell you something about the way she died." I said, "Well, it would still have to be my opinion that she was either strangled or smothered," and he nodded his head, didn't say anything [T. T. pp. 244, 245].

• • •

Q. Captain, I show you State's Exhibit P, ask you to state what that is, if you know.

A. Yes, sir. That's the body of Pamela Powers as seen in the ditch, the scene I described out by Mitchellville.

Q. Now is Exhibit P, had some snow been brushed off her—

A. Yes, sir.

Q. —from when you first saw her. Captain Leaming, state whether or not Williams told you anything about placing the body in this particular spot.

A. Yes, sir, he did.

Q. What was that?

A. He said that when he arrived at this spot he was going to put her, he had her wrapped in a blanket and clothing and all wrapped together. He was going to take the whole works and

put it in the ditch, but when he lifted her out of the car that she fell out of the blanket and fell onto the ground and that the house, first house east, there was a car out there and he was afraid that they might come down there and discover him, so he just threw the articles of clothing back into the car and put the body in the ditch, and then later disposed of the clothing and the blanket.

Q. State whether or not at any time prior to finding the body he described the way she would be dressed.

A. Yes, sir. At the time that he—when we were on Interstate 80, before we got to the Grinnell area or to the Mitchellville area, when he stated that he was going to show us where the body was, I asked him if she was clothed and if she had anything wrapped around her, and he said no, that she was nude for the exception of a little blouse.

Mr. Hanrahan: That's all.

CROSS-EXAMINATION

BY MR. McKNIGHT:

Q. Captain, how long have you been on the police force?

A. Nineteen and a half years.

Q. This about the talkigest prisoner you have ever seen, wasn't it?

A. Real good talker, yes, sir.

Q. Unusual, isn't it?

A. Well, you don't get too many of them.

Q. That's what I thought. Now let me ask you this, let's go back to the beginning, do you remember when Henry McKnight walked into the detective office on the morning of the 26th?

A. Yes, sir.

Q. About what time was it?

A. About ten minutes till nine.

Q. All right. Did I say anything?

A. Yes, sir.

Q. What did I say?

A. You said that you had received two phone calls from Mr. Williams, one from Rock Island and one from Moline, and that he had talked to you and you had advised him to turn himself in to the Davenport Police Department, that you had told him if he turned himself in in Illinois that it would probably be after the first of the year before we could get him back to Des Moines, that you had told him that if he would go over—that he should go to Davenport and turn himself in to the police department and he told you that he would. And you told him that if he kept his word with you and did go turn himself in, that you would do everything you could to try to help him.

Q. All right. Now while we were there, did we get a call?

A. Yes, sir.

Q. From Davenport?

A. Yes, sir.

Q. And do you know the substance of what was said?

A. Yes, sir.

Q. What was that?

A. The phone call I got, are you referring to?

Q. Yes.

A. At approximately two minutes after nine, I received a call from the Davenport Police Department. They stated that Williams had turned himself in, that he was there, that he was on the telephone attempting to call his attorney Mr. McKnight.

Q. Weren't you told then by Lieutenant Ackerman that this man won't talk until he sees McKnight?

A. No, sir.

Q. You deny that?

A. I deny that [T. T. pp. 247-250].

Q. He didn't say anything about this man isn't going to talk till he sees McKnight?

A. Not to my knowledge, no, sir.

Q. All right. Now listen, Captain, did you hear me talking to Williams?

A. Yes, sir.

Q. How far were you from me?

A. About three feet.

Q. Three feet. Well, let me get up, were you as close as I am to you now?

A. No, sir.

Q. About how far were you?

A. About three feet.

Q. Let's go back there and correct. Where was your phone?

A. Right behind my desk.

Q. All right. Now didn't I talk on that phone?

A. Yes, sir.

Q. And you say that's three feet from you?

A. It's got a cord on it. You were standing up, I believe, Mr. McKnight.

Q. Now wasn't I standing in front of the desk originally?

A. Yes, sir.

Q. Didn't I walk around to the back of the desk where the phone was?

A. Yes, sir.

Q. And weren't you sitting right there in the chair?

A. Yes, sir.

Q. And you want to say I was three feet from you?

A. Yes, sir.

Q. All right. Do you want to say there is three feet between your desk and where that telephone was sitting?

A. No, sir.

Q. All right. Didn't you hear me say, "Williams, these gentlemen are coming after you and bringing you straight back to Des Moines."

A. Something to that effect, yes.

Q. All right. Didn't you hear me say, "You make no statement till you get here and we'll clear this matter up when you get here in Des Moines and we'll have a conference."

A. No, sir, not in that manner.

Q. I didn't say that?

A. No, sir.

Q. Well, now let me stop you right here and ask you this: When you came in with Williams, did you say to me, "We'll now have our conference and some coffee."

A. No, sir.

Q. You deny you said, "We'll have some coffee and a conference."

A. I don't deny the coffee part. I didn't get a chance to say anything about any conference.

Q. Wait a minute. Wait a minute. Didn't you say about a conference and did I say to you, "What kind of conference can you have with me?"

A. I think you said that.

Q. All right. Now why would I say that if you hadn't said anything?

A. You were awful mad, Mr. McKnight. I don't know why you said what you said.

Q. Didn't I say you double-crossed me?

A. Yes, you did.

Q. All right. Now let me ask you this, let's go back: Do you deny that Kelly said to you that this man will make no statement till he gets to Des Moines to his lawyer?

A. I deny that, yes, sir.

* * *

Q. Do you deny that you told this prisoner McKnight's got a heart attack and he had to go home and go to bed?

A. I do deny that, absolutely.

Q. Didn't say anything about that?

A. Didn't say anything that sounded like that.

Q. How did it sound?

A. You want me to tell you what I said about that?

Q. Yes, about the heart attack.

A. I told him that you would be waiting for us in Des Moines, that this shook you up quite a little in talking to him and that you did say something to me about going home for a little while. But you would be back when we got there.

Q. All right. You told him and you knew when you was out there that I was waiting for you, didn't you?

A. Yes, sir, I told him so [T. T. pp. 251-254].

* * *

Q. And you want us to believe you didn't ask him no questions about the body or about the Powers girl?

A. About what?

Q. About the Powers girl.

A. I couldn't say I asked him no questions.

Q. You in fact asked him a lot of them, didn't you?

A. Well, I asked him some in reference to, is this the right direction or, we're starting to go north—

Q. Isn't it a fact when you were right out here, you said look here, you're lying to me, you know there ain't nothing here; didn't you say that?

A. No, sir.

Q. Now there is no question, you didn't advise him anything about his rights out there, did you?

A. No, sir.

Q. And there is no question about he's not a lawyer?

A. No, sir.

Q. And there is no question, you knew he was a mental patient?

A. That's right.

Q. Now let me ask you this: When you said to him you say you said to him it's snowing out here, bad weather, isn't that what you said to him?

A. Yes, sir.

Q. He didn't ask you that, did he?

A. No.

Q. Didn't you say that to him to induce him to show you where the body was?

A. I was hoping he would.

Q. You was hoping he would?

A. Yes, sir.

Q. So you wanted to make it appear to him that it might be harder or impossible to get out there the next day, you told him there was going to come a big snow, didn't you?

A. No, I didn't tell him there was going to come a big snow. I asked him to observe the weather, observe the visibility, observe it sleeting and it raining and they're predicting snow for tonight.

Q. And that was for the purpose of inducing him to talk, wasn't it?

A. Telling the truth.

Q. Well, I said, wasn't that for the purpose of getting Mr. Williams to talk?

A. Well, I was hoping he would tell me where the body was, Mr. McKnight, absolutely.

Q. And I think you said a while ago you figured I was there waiting in Des Moines for you, right?

A. Yes, sir.

Q. What time do you think you got there, to Des Moines?

A. Probably between 7 and 7:30.

Q. You didn't once call in and tell them to tell McKnight we've got his client out here and he's showing us everything, did you?

A. No, sir.

Q. And you knew I was there waiting for him?

A. Yes, sir [T. T. pp. 256-258].

* * *

Q. Now you did say to the defendant, you are the only person that can tell us where this body is; didn't you say that to him?

A. Yes, sir.

Q. Wouldn't you consider that a form of interrogation?

A. No. A statement.

Q. Statement. Didn't you make this statement: I know that this body is in the Mitchellville area, you just as well tell us?

A. No, sir, not in that manner.

Q. Well, didn't you say something to that effect?

A. Yes, something to that effect.

Q. And you didn't know that at all, did you?

A. I had a pretty good idea it was.

Q. But you didn't know it, did you?

A. Not positively, no, sir.

Q. And when you said that, you wasn't telling him the truth, were you?

A. Not one thousand per cent, no, sir.

Q. Not one thousand per cent. You made that statement to induce him to tell you, didn't you?

A. I made it hoping that he would [T. T. pp. 259, 260].

* * *

Q. Now is it your statement that Williams started to questioning you first when you got out on Interstate 80 coming back to Des Moines?

A. Yes, sir.

Q. Do you remember testifying here once before in this courtroom in regards that you made a statement to Williams first?

A. Oh, I remember testifying here and very possibly I did.

Q. Well, did you or didn't you?

A. Well, we were talking, Mr. McKnight, I think the statement I made here today was after we got out on the freeway and he started talking to me, we traveled from the police station up to the gas station and over to the freeway before that, we had some conversation.

Q. Well, now, when you got out on the freeway, didn't you testify once before that you said you wanted to make a statement to Williams; do you remember that?

A. Yes, sir, I did.

Q. Now had Williams said anything to you before then about the Powers child?

A. Before I mentioned to him that I want you to observe the weather and so on and so forth?

Q. Yes.

A. Yes.

Q. Where was this?

A. Well, first thing he asked me was, if I hate him and I want to kill him. This was right after we got on the freeway, after we left Davenport or after we gassed up, got on the freeway.

Q. And that was right after you got the gas and got on the freeway?

A. Yes, sir [T. T. pp. 261, 262].

* * *

Q. He said you all want to shoot me or something, didn't he?

A. He said, "I'll bet those guys wish I would jump out and run so they could shoot me."

Q. Now when you left, just before you left, do you remember we had parted greetings and didn't you say, "I'll go get him and bring him right back here to Des Moines?"

A. Yes, sir.

Q. You said that to me, didn't you?

A. Yes, sir.

Q. Knowing that you were dealing with a person from a mental hospital, did you say to him, you don't have to tell me this information, did you say that to him out there on the highway?

A. What information?

Q. The information that he gave you, the defendant gave you, you didn't say that to him, did you?

A. No, sir.

Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?

A. I was sure hoping to find out where that little girl was, yes, sir.

* * *

Q. Well, I'll put it this way: You was hoping to get all the information you could before Williams got back to McKnight, weren't you?

A. Yes, sir.

Q. Well, let me ask you this: In all your getting, Mr. Williams has never admitted he took this girl's life, has he?

A. No, sir [T. T. pp. 262-264].

* * *

REDIRECT EXAMINATION

BY MR. HANRAHAN:

Q. Captain, when Mr. McKnight was in your office on the morning of the 26th of December, what conversation did you hear from him when he was on the telephone?

A. Well, I heard him say that, "You have to tell the officers where the body is," and he repeated a second time, "You have got to tell them where she is." He then said, "It makes no difference, you have got to tell them, you have already been on national hook-up." He said, "What do I mean by national hook-up? I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is."

He then said, "It makes no difference anyway. When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story." And he then turned to me and said, "He's afraid somebody's going to hit him in the head." And I said, "Well, Mr. McKnight, if you would like, I'll go after the man myself personally." And he said, yes, he'd like that. And he then talked back on the phone and he said, "Mr. Leaming is coming after you," and he said, "I know this man personally, he's a fine man and he won't let any harm come to you." That's about the size of it.

Mr. Hanrahan: That's all.

RECROSS EXAMINATION

BY MR. McKNIGHT:

Q. Say, Officer, that's interesting. Now you know we didn't know whether the girl was dead or alive when you left here, did we?

A. You told me she was dead.

Q. You want to say that I told you that?

A. Yes, sir. You said that Williams told you that.

Q. When did I say that?

A. Right there in my office in front of Chief Nichols. You

said he said she was dead when he left the YMCA with her [T. T. pp. 265-266].

* * *

ARTHUR W. NELSON,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

Q. Would you state your name and address, sir.

A. Arthur W. Nelson, 3021 E. 8th Street, Des Moines, Iowa.

Q. What is your occupation or profession, Mr. Nelson?

A. Detective, Police Department, Des Moines, Iowa.

Q. How long have you been on the Des Moines Police Department?

A. Over fifteen years.

Q. You were on the Des Moines Police Department on December 24th, 25th, 26th, 1968?

A. I was.

Q. And in what capacity do you serve on the police department?

A. Detective in the Robbery and Homicide Division of the Detective Bureau.

Q. On December 25th, 1968, did you make a trip to Davenport, Iowa?

A. I did [T. T. p. 269].

* * *

Q. Did you again go to Davenport on December 26th, 1968?

A. Yes, I did.

Q. And with whom did you go at that time?

A. That was Captain Leaming and myself.

Q. What time did you leave Des Moines for Davenport?

A. Shortly after 9, a. m., approximately 9:15, a.m.

Q. What time did you arrive in Davenport?

A. Sometime before noon, between 11:30 and 12.

Q. Whereabouts in Davenport did you go when you got there?

A. Directly to the police department.

Q. And what did you do at that time at the police station?

A. We talked to Lieutenant Ackerman who was in charge of the Detective Bureau at that time [T. T. pp. 270, 271].

* * *

Q. I see. Now how long was it before you left Davenport?

A. We left Davenport just about on the hour of 2:00, 2, p.m.

Q. Did you observe the defendant Williams having any conference with Attorney Tom Kelly?

A. Yes, I did. I observed the two in the room by themselves or going into the room, twice.

Q. This is between the time you returned after lunch—

A. Between 1 and 2, yes, sir.

Q. Did you drive the car down to Davenport?

A. No; Captain Leaming drove down. I drove back.

Q. All right. After you left the police station, did you go down to your car?

A. Yes, went directly out to the car.

Q. Who went to the car?

A. Captain Leaming, myself, Mr. Williams, Mr. Kelly and several of the Davenport policemen. I couldn't tell you exactly which ones.

Q. When you got in the car, who got in the back seat?

A. Captain Leaming and Mr. Williams.

Q. And you got in the driver's seat?

A. Yes.

Q. Just the three of you in the car?

A. Yes.

Q. Did you leave the area immediately?

A. Yes.

Q. Where did you go from the police station?

A. Went north out of town. I can't tell you the streets. I'm not that familiar with them. But we went north out toward the interstate highway and before we got to the interstate we stopped for gasoline at the filling station.

Q. After you gassed up, did you go directly to the interstate?

A. Yes [T. T. pp. 272, 273].

* * *

Q. Now as you proceeded west on the interstate toward Des Moines, did you have any conversation with the defendant Williams?

A. Very little conversation.

Q. Did you hear any conversation between the defendant Williams and Captain Leaming?

A. Yes, I did [T. T. p. 274].

* * *

Q. State whether or not you heard any conversation between Captain Leaming and the defendant Williams regarding Pamela Powers' boots and shoes.

A. Mr. Williams brought the subject up, he stated—this was before we got to Grinnell, he asked if we had found her boots and Captain Leaming stated that there had been some clothing and articles found in a rest area west of Grinnell, but that we did not know what was included in these articles found. We did not have time to look at the reports and so forth before we left, and we didn't know whether there was boots included in these articles or not. And I stated that Detective Speck had gone after these

articles and I hadn't had a chance to talk to him either, so I couldn't say whether there was boots found or not.

And we asked Williams if the boots were with the other articles and he stated no, they were behind a filling station, he believed to be a Skelly filling station on the exit or just off the exit to Grinnell.

Q. Where were you from this Grinnell exit at that time, Mr. Nelson?

A. I would say we were between Iowa City and Grinnell at this time. I couldn't say exactly the location, but—

Q. You had not yet—

A. We hadn't come to Grinnell. We were quite a ways away yet at that time.

Q. What if anything did you do when you reached the Grinnell turn-off?

A. Well, before we got to the Grinnell turn-off, I asked Mr. Williams if it was to the exit toward the north, toward Grinnell, and he stated it was, so I took that exit. And there is two filling stations, one on the right-hand side of the road or the east, and one on the west, and I asked if it was one of those filling stations, and he stated, yes, it was the filling station on the east side of the road [T. T. pp. 276, 277].

Q. Did you go to this service station?

A. Yes, we did. I drove up toward the side and asked him where the boots would be if they were there, and he stated, well, it's on around in back. There is a restaurant attached to the filling station, and he stated that it would be—they would be behind the restaurant part of the building. And he stated that there were a bunch of discarded boxes and so forth back there and he put the boots in one of these boxes.

Q. Did you drive him around the back of the service station?

A. Yes, I did. And he pointed to the proximity of where the boots should have been. I got out of the car and looked around but couldn't find the boots, or no boxes either [T. T. p. 278].

Q. Then was there any more conversation after you got back on the interstate?

A. Well, even before we stopped at the Skelly station we had conversation with the subject in reference to this other found property at the rest area, and at that time he asked if we had found the blanket. And again Captain Leaming nor myself knew just what had been found, so we were not familiar with what was found, so we didn't know whether a blanket was included or not in the property found. And he stated that he had put the blanket along with the clothing and so forth in the men's room of the rest area. He stated that the clothing he had put in the paper towel receptacle, but the blanket was too big, so he threw it up over one of the partitions there in the restroom.

Q. Did you go to the rest area then?

A. Yes, I did [T. T. pp. 280, 281].

Q. Did you find the blanket there at that time?

A. No, I did not.

Q. Did you proceed on from the rest area then?

A. Yes, I had to go back to the Grinnell exit to get back on the eastbound lane [T. T. p. 282].

Q. Now was there any further conversation about this matter, Pamela Powers matter?

A. Not too much conversation about that. There was conversation in the rear seat between Captain Leaming and Mr. Williams. Much of the conversation I couldn't understand. Mr. Williams spoke so low that part of his conversation I couldn't make out, but I did hear him state before we got to the Mitchellville interchange that he would show us the body.

Q. Did he tell you where to go to find the body?

A. Yes, he did. He stated that the body was approximately two miles away from Mitchellville, and he stated after he got off of the interstate going to Mitchellville, that he went away from town. So when he stated away from town or away from Mitchell-

ville, I presumed that he meant north away from town, and as I left the interstate, got on the exit, I proceeded north.

Q. That would be up this way?

A. Right. I no sooner started north on that road when Mr. Williams wanted to know where I was going, and I stated, "Well, you said you had gone away from town where you disposed of the body," and he says, "Well, this is not the way." He stated, "It's back the other way." He said, "Where is the filling station?" And the filling station was back toward Mitchellville on the south side of the interstate, and so we proceeded to turn around, and after we got by the DX station—I'll show you, this would be the station here, this is where it was. We went up this way, come back here and there was a DX station right here, and he stated to go to the first road and drive back west approximately a mile, mile and half, and that's where the body would be on the north side of the road, in the ditch.

Q. And did you go back west on this first road?

A. Yes, we did. We searched with the assistance of the State Bureau of Investigation and one highway patrol car. And after looking for a matter of ten or fifteen minutes in that area, he stated that it was possible that this was not the road, it may have been a road further south [T. T. pp. 282-284].

* * *

Q. Now what did you do when you got down here on this east-west road in the south?

A. We proceeded west to where we had passed a farm house that Mr. Williams stated it was on the south side of the road, and he stated that looked like the area, looked like the house. He stated there should be another farm house on further west on the north side of the road, and it was right between these two farm houses.

After we passed this farm house on the south side of the road, he stated that—or correction, Jack Wissler in the highway patrol car was stopped up ahead, and he stated that this was the proximity of the body and, in fact, he stated, "Well, he must have found it," because he had his spotlight into the ditch on the north side of the road. But as we got closer to the highway patrolman, he started up and as we met him, we asked him if he had seen any-

thing, and he said no. And we said, well, Williams stated that he was about at the right spot. And we returned to this spot, and the highway patrolman and the state agents got out and started looking along the ditch. And after they had looked a little while and hadn't found anything, why, Mr. Williams stated, "Well, I might be mistaken again. It might be up further," and I was just getting ready to pull on up going further west when the other men hollered that they had found it and flashed their light on it.

Q. Did you get out of the car, Mr. Nelson?

A. Yes, I did.

Q. And did you observe the body of Pamela Powers at the scene?

A. Yes, I did [T. T. pp. 285, 286].

* * *
CROSS-EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Does this sound sort of strange to you that Williams was asking most of the questions?

A. Oh, not the type of questions he was asking.

Q. That isn't the way a detective works, they usually ask the questions, don't they?

A. For interrogating someone, yeah.

Q. You all were trying to find out about this child, weren't you?

A. We weren't interrogating him.

Q. Oh, you weren't interrogating?

A. No.

Q. So everything you testified to, Williams just started talking?

A. He did a lot of talking, yes, sir.

Q. Without anybody asking him anything?

A. Yes, other than I told you, first when we left Davenport, Captain Leaming asked him to think about telling us where the body is.

Q. So then how far did you ride while he was in there thinking about is?

A. He didn't tell us that he was going to tell us about the body between Grinnell and Mitchellville, but he done other talking between.

Q. So Captain Leaming evidently said to think about it right after you got on the interstate?

A. Yes.

Q. That's one hundred sixty-seven miles from Des Moines?

A. Yes.

Q. Grinnell is how far from Des Moines?

A. I suppose fifty, sixty miles, fifty, fifty-five [T. T. pp. 289, 290].

* * *

Q. Didn't Captain Leaming say to this defendant, you are the only person that knows whether this girl is dead or alive and where the body is?

A. I don't know that he asked that, no. He may have said that you are the one that could tell us where it is.

Q. Well, now, Williams wasn't talking then, was he?

A. He was talking most of the time. Like I stated, he did a lot of talking [T. T. p. 291].

* * *

Q. Well, now, didn't Captain Leaming say, I know the body is in the Mitchellville area?

A. He did make that statement, not that he knew, that he presumed the body was in the area, Mitchellville area, yes, sir [T. T. p. 292].

* * *

THOMAS M. KELLY, JR.,

called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Would you state your full name.

A. Thomas M. Kelly, Jr.

Q. Where do you live, Mr. Kelly?

A. 758 Knoxville Road, Milan, Illinois.

Q. What is your business or occupation?

A. I'm an attorney.

Q. And where is your office?

A. 210 Main Street, Room 200 Kresge Building, Davenport, Iowa.

Q. How long have you been an attorney, Mr. Kelly?

A. Since '52. I've been in Davenport since 19 — April of 1958.

Q. Now Mr. Kelly, I'll ask you whether or not you were in Davenport on December 26, 1968?

A. I was.

Q. I'll ask you whether or not you became acquainted with a man you now know as Robert Anthony Williams?

A. I did.

Q. Do you see Mr. Williams in the courtroom?

A. Yes, I do.

Q. Where do you see him?

A. He's seated directly behind you.

Mr. McKnight: Let the record show that the witness has identified defendant Williams.

Q. Where did you see Mr. Williams?

A. First time I saw Mr. Williams was in the courtroom of the Municipal Court of the City of Davenport.

Q. Now let's backtrack, had you had any conversation by telephone or otherwise with me prior to the time you saw Mr. Williams?

A. No, I did not.

Q. Now what if anything was Mr. Williams doing when you saw him?

A. He was before the Honorable Judge Bertram B. Metcalf who was advising him of his rights. Present in the courtroom was Lieutenant Ackerman and another Davenport detective. I was standing beyond the bar, so to speak.

Q. Did you see Mr. Williams do anything or say anything with reference to you?

A. Mr. Williams asked the Judge if I was a lawyer and the Judge informed him that I was, and he asked me if I would talk to him which I agreed to do.

Q. Where did you go for this?

A. From there we left the courtroom, Mr. Williams was in the custody of Lieutenant Ackerman. We went back to the Davenport Detective Bureau and there we went into one of the rooms that they use to question suspects [T. T. pp. 347-349].

. . .

Q. About how long did the conversation last?

A. First conversation I had with him lasted about forty minutes [T. T. p. 349].

. . .

Q. All right. Then did you go to lunch?

A. They left. Then I left. And then I came back about 1:15 or so in the afternoon to the Davenport Detective Bureau.

Q. Did you see Mr. Leaming when you came back?

A. Yes, he was present, and the sergeant was present.

Q. Then what if anything took place?

A. Mr. Williams wanted to talk to—I was given the impression at first that Mr. Williams wanted to talk to me and Lieutenant Ackerman of the Davenport Detective Bureau, and it later developed that he only wanted to talk to me.

Q. Did you talk to him?

A. I talked to him again, I'd say, for about, oh, fifty or sixty minutes, an hour.

Q. And then what if anything did Leaming say when the conversation was over?

A. Well, I came out of the—again one of these small rooms, and I—Leaming had knocked on the door and said he was ready to travel, and then we had a discussion about an agreement that Leaming had between you and he.

Q. You had that conversation with Mr. Leaming?

A. That's right. I had a discussion with him earlier that morning about that, prior to the time that he went to lunch.

Q. What did Leaming say to you?

A. Well, I told him that it was my understanding that Mr. Williams was to be returned to the city of Des Moines and after his return to the city of Des Moines that you would talk to Williams in Leaming's office, and at that time he would reveal where the body was.

Q. Did you say body or the child?

A. Well, he said child and then he said body. I mean, this is what Leaming said to me. I might be interposing some words here that are not exactly the exact conversation, but this is the general context of it.

Q. Now what did Leaming say to that?

A. The last conversation I had with him, he said, well, "This isn't quite the way I understand it." And I said, "Well, this is the way I understand it." And I said, "I think it should be followed through, it should be carried out," and then we decided we'd have to get him out of there and we still had all these newsmen around, so I suggested an escape route to avoid the photographers. It was along about this same time that I offered the captain, I said, "I'll ride back to Des Moines with him to

make sure his rights are protected.”

Q. What Captain Leaming say to that?

A. He said I could not ride in a Des Moines police car.

Q. Then what did Leaming say?

A. So then I said to him, jokingly, I said, “Maybe I should follow you in my car.”

Q. What did he say to that?

A. He didn't like the idea. At least I got the impression that he didn't like the idea [T. T. pp. 350-352].

* * *

WENDELL NICHOLS,

called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Now did you hear any statement that I made to Leaming in that office that the child is dead?

A. Yes, I did [T. T. p. 358].

* * *

Q. Yes, are you saying that I said that?

A. All I can say is this, Mr. McKnight, prior to the telephone call coming to Des Moines, I remember that and I thought this was speculation on your part. I think we all speculated as to what happened, and you made the statement that she was dead when she left the hotel. I know that. And at that point I became quite emotional.

Q. I said we all said she was probably dead when she left the hotel. We all thought that. Isn't that what was said?

A. The statement you made was, “I figured she was dead. I know she's dead.” And I think at that point that conversation was not limited to you. I'm sure I may have said the same thing.

Speculating.

Q. We were just speculating?

A. I think this was probably—

Q. You didn't hear me tell anybody that Williams told me this girl was dead, did you?

A. I don't recall that you actually said Williams said this. But I know that you did say that you had talked to Williams prior to this [T. T. pp. 358-359].

* * *

On May 13, 1969, the following Motion for New Trial was filed in the District Court of the State of Iowa, in and for Polk County:

COMES NOW the Defendant and for his Motion for a new trial states and shows to the Court as follows:

1. That the court was in error in overruling the Defendant's Motion to Suppress the evidence, which ruling was duly made after formal hearing on April 2, 1969, but the ruling was not filed with the court's findings until May 6, 1969 for the reason that the court specifically found that there was an agreement between counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines and that he would talk to police officials with his attorney on arrival in Des Moines; that the findings of the court are in keeping with the facts, but the application of the law to the facts, the Defendant feels that the court was in error and that said evidence should have been suppressed.

2. That the court was in error in its ruling on the admissibility of the evidence given by each and every witness concerning the statements, admissions and demonstrations made by the Defendant on the return trip from Davenport to Des Moines, Iowa on December 26, 1968 for the reason that said admissions, demonstrations and confession were taken from the Defendant in violation of his constitutional rights, which are guaranteed to him under the Fifth Amendment to the Constitution of the United States and the Sixth Amendment to the Constitution of the United States in that the Defendant is compelled to produce evidence against himself and that he was effectively denied assistance of counsel, which is also guaranteed to the Defendant as to due process of law under the

State Constitution, Article One, Section Nine, and as to assistance of counsel, Article One, Section Ten of the Iowa Constitution.

* * *

8. That the Court was in error in giving Instruction No. 9 for the reason that the court failed to give in its instruction that the state was required to prove beyond a reasonable doubt that at the time of such alleged acts and statements, the Defendant was informed of, understood and thereafter knowingly waived such rights, and the Court left it to the jury to conclude, and the jury might have concluded that the State was only required to prove by the preponderance of the evidence that the Defendant knowingly waived his rights; that in giving such instruction, it was erroneous and misleading.

WHEREFORE, Defendant prays that the Court grant a new trial in the above entitled matter for all of the reasons set out herein.

/s/ Henry T. McKnight
HENRY T. McKNIGHT
 Attorney for Defendant
 506 East Walnut Street
 Des Moines, Iowa 50309
 243-5293

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on this 18th day of February, 1976, three (3) copies of the Appendix were mailed, correct postage prepaid, to:

Mr. Robert Bartels
 University of Colorado
 Fleming Law Building
 Boulder, Colorado 80302

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
 Assistant Attorney General
 State Capitol
 Des Moines, Iowa 50319
Attorney for Petitioner.